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ARTICLE

LENDER/OWNERS AND CERCLA: TITLE AND LIABILITY

ANN M. BURKHART*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) represents Congress' response to the problem of cleaning up hazardous waste sites. The Act and its related regulations authorize the Environmental Protection Agency (EPA) either to order the responsible parties to contain the hazardous waste on the site or to clean the site and charge the responsible parties for EPA's response costs. An unresolved issue is whether these provisions contemplate holding a lender/owner liable for response costs.

In this Article, Professor Burkhart rebuts challenges to lender/owner liability. She begins by scrutinizing the language and legislative history of the liability provisions and their exceptions and reviewing the relevant environmental case law. She then considers constitutional challenges to lender/owner liability. Next, she reviews common law bases of liability. Professor Burkhart concludes that lender/owners should be held liable for response costs under CERCLA.

I. INTRODUCTION

The hazardous waste disposal problem has reached a disastrous level in America. Only recently have studies demonstrated the magnitude of the environmental problem, not only in terms of the large number of dump sites that are polluting our air and water, but also in terms of the effects of these toxics on human beings and their habitats. Evidence has established a causal link between toxic chemical exposure and such health problems as cancer, birth defects, and personality disorders.¹ Dramatic large-

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¹ C. BOWSHER, COMPTROLLER GENERAL, REPORT TO THE CONGRESS, CLEANING UP HAZARDOUS WASTES: AN OVERVIEW OF SUPERFUND REAUTHORIZATION ISSUES, GAO/RCED-85-69 5-7 (1985) [hereinafter COMPTROLLER GENERAL REPORT]; 126 CONG. REC. 26,208 (1980) (statement of Rep. Ratchford (D-Conn.)); J. Moorman, Land and Natural Resources Division, Dep't of Justice, The Superfund Concept: Report of the Interagency Task Force on Compensation and Liability for Releases of Hazardous Substances 5-9, (June 1979) [hereinafter The Superfund Concept] (on file at the Harvard Journal on Legislation). See also Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 584 n.1 (1981) [hereinafter Note, *Allocating Costs*]:

In one case, chemicals allegedly migrating from a dump site included dioxin, which produces cancer, birth defects, and mutations; tetrachloroethylene, a carcinogen that has adverse effects on the central nervous system; and chloroform, which causes narcosis of the central nervous system, destruction of liver cells, kidney damage, harmful alterations of blood chemistry, and cardiac problems.

scale environmental disasters, such as those that occurred at Love Canal and at Times Beach,² have impressed upon the American public the potentially catastrophic proportions of the problem. Federal, state, and local governments also have felt the impact, not only in human terms, but also in economic terms; the Love Canal cleanup alone has cost the government more than \$30 million, whereas proper disposal practices might have amounted to only \$3 to \$4 million at the time of disposal.³

A University of California public health physician has estimated that 6% of all cancer deaths in California are caused by toxic chemical exposure. 131 CONG. REC. H11,111 (daily ed. Dec. 5, 1985) (statement of Rep. Fazio (D-Cal.)). Representative Fazio also noted toxic chemicals' substantial negative impact on the environment. For example, in San Francisco Bay, the reduction in the striped bass population, which is at least partially attributable to toxic pollutants, costs California's fishing industry several billion dollars per year. *Id.* Some experts, however, believe that the health risks from toxic chemical exposure are minimal. *See, e.g.,* Ames, Magaw & Gold, *Ranking Possible Carcinogenic Hazards*, 236 SCIENCE 271 (1987).

² On May 21, 1980, President Carter declared a Federal emergency at the Love Canal in Niagara Falls, New York, the site of chemical dumping by the Hooker Chemical and Plastics Corporation from 1942 to 1953. Nearly 1000 families were evacuated, and the State and Federal Governments provided funds to buy contaminated properties. Molotsky, *President Orders Emergency Help for Love Canal*, N.Y. Times, May 22, 1980, at A1, col. 2; *Actions at the Love Canal Site*, N.Y. Times, Feb. 23, 1980, at A19, col. 6.

On February 23, 1983, the Federal Government announced its intention to spend \$33 million to buy back all homes in Times Beach, Missouri, a town contaminated by dioxin sprayed on its streets some ten years earlier. Reinhold, *U.S. Offers to Buy all Homes Tainted by Dioxin*, N.Y. Times, Feb. 23, 1983, at A1, col. 6.

³ 126 CONG. REC. 26,338 (1980) (statement of Rep. Florio (D-N.J.)). In calculating its fiscal 1988 budget request, the Environmental Protection Agency (EPA) estimated an average cleanup cost of \$10-\$12 million per site. *Justice Official Tells BNA Conference that PRPs Deserve Access to Superfund Sites*, [Current Developments] 17 Env't Rep. (BNA) No. 49, at 2049, 2050 (Apr. 3, 1987). The Director of the Division of Solid and Hazardous Waste for the New York State Dep't of Environmental Conservation estimated an average cleanup cost of more than \$15 million per site. *Id.* One federal agency has stated that cost estimates for cleaning a site range from \$1-\$30 million. OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY 61 (1985). *See also* H.R. REP. NO. 253, 99th Cong., 2d Sess. 256, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2930-31 (statement of Rep. Scheuer (D-N.Y.)).

Chevron spent \$10 to \$12 million to resolve the liability for cleaning up a 30,000-gallon gasoline leak. In 1978, Exxon spent between \$5 and \$10 million as a result of leak [sic] in East Meadow, New York. Estimates for liability resulting from such underground gasoline leaks range as high as \$25 million.

Id. at 2930-31; 126 CONG. REC. 25,100 (1980) (statement of Rep. Eckhardt (D-Tex.)) (In one year "the Justice Department has filed a total of 40 suits for remedial work with an estimated cost of between \$330 million and \$590 million. While these statistics hint at the size of the problem, they are merely the tip of the iceberg."); The Superfund Concept, *supra* note 1, at 11 (estimated per site cleanup cost of \$25.9 million). The cost estimates for rehabilitating the most dangerous sites that have been discovered to date are enormous.

EPA has estimated that the total price tag for cleaning up the nation's worst abandoned hazardous waste sites could run as high as \$46 billion. . . . [The] GAO has estimated that the federal share of cleanup could run as high as \$39 billion, with private parties paying roughly equivalent amounts to complete cleanup. The Office of Technology Assessment estimates the total cleanup

The pervasive use of hazardous chemicals in commerce and the virtual absence of effective methods for permanent disposal of hazardous wastes guarantee that the problem will be of continuing importance.⁴

price tag at roughly \$100 billion, counting both public and private sector contributions to such costs.

H.R. REP. NO. 253, 99th Cong., 2d Sess. 278, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2953. *See also id.* at 257, 1986 U.S. CODE CONG. & ADMIN. NEWS at 2931-32; COMPTROLLER GENERAL REPORT, *supra* note 1, at 17.

⁴ As of January 23, 1987, EPA has included 703 sites on the National Priorities List (NPL) and has proposed 248 additional sites for listing. *EPA Seeks Comments on 64 Proposed Sites to be Added to the National Priorities List*, 17 Env't Rep. (BNA) No. 41, at 1725 (Feb. 6, 1987). Once listed on the NPL, a site is eligible for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanup funds, more commonly known as "Superfund." Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2781 (1980) (codified at 42 U.S.C. §§ 9601-9657 (1982 & Supp. II 1984)), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1760-74 [hereinafter all citations to CERCLA, or "the Act," will be to the U.S. Code and Supplement]. The NPL includes only those discovered sites that pose the greatest threat to human health and to the environment. The magnitude of the total problem is better demonstrated by EPA's hazardous waste site inventory, which includes approximately 20,000 sites that may pose a threat to human health and to the environment. *CERCLA Enforcement Figures Called Low for Fiscal 1986*, [Decisions] 25 Env't Rep. (BNA) No. 4, at *front cover, inside front cover* (Nov. 28, 1986). Senator Stafford (R-Vt.) has stated that the actual number of such sites could be 378,000:

[T]he General Accounting Office [GAO] has reported that the potential universe of Superfund sites in fact could be much larger than [sic] previously acknowledged, and could include some 378,000 facilities. The GAO report concluded that relatively little emphasis has been given to site discovery. Aside from the initial effort in 1982 which uncovered most of the sites on the current inventory, the Federal Government has relied primarily on local governments and the public to discover new sites. It has not conducted any other systematic discovery effort. According to the GAO report, the Environmental Protection Agency has acknowledged [sic] that a targeted, systematic discovery effort combined with a change in program emphasis toward cleaning up sites that have not yet received sufficient attention, could increase the number of sites well beyond the 25,000 figure. For example, the Environmental Protection Agency acknowledged in the report that there are some 34,000 to 52,000 municipal landfills and some 9,770 to 63,770 mining waste sites not yet been listed [sic] or evaluated under the Superfund Program.

132 CONG. REC. S14,896 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).

Despite general knowledge of the injuries and costs caused by improper disposal, the problem is worsening. EPA estimated that of some 57 million metric tons of hazardous waste produced in 1980, as much as 90% was disposed of in an environmentally unsound manner. 126 CONG. REC. 26,339 (1980) (statement of Rep. Staggers (D-W. Va.)). For example, Representative Ambro (D-N.Y.) stated in floor debates that, during 1978, Hooker Chemicals & Plastics Corp. dumped more than 1,600,000 pounds of industrial wastes in a landfill. "Despite Hooker's knowledge that these wastes were largely hazardous and constitute a threat to human health as they leach into the ground water supply, there was no surveillance by the corporation of the site." 126 CONG. REC. 26,351 (1980) (statement of Rep. Ambro). EPA has now banned land disposal of some of the most toxic wastes. *See U.S. Industry in Midst of Profound Change in Management of Hazardous Waste, Florio Says*, [Current Developments] 17 Env't Rep. (BNA) No. 47 at 1919 (Mar. 20, 1987). *See also Developments—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1462 (1986) [hereinafter *Toxic Waste Note*].

The severity of the problem also results in part from the pervasive use of hazardous

In response to the problem of improper hazardous waste disposal, Congress in 1980 enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁵ often referred to as "Superfund,"⁶ and in 1986, the Superfund Amendments and Reauthorization Act (SARA).⁷ Among other provisions, CERCLA authorizes the government not only to rehabilitate hazardous waste sites, but also to recover its costs and other specified damages from the entities specified in subsection 107(a).⁸

substances. According to Representative Breaux (D-La.), EPA has identified more than 4,000 types of businesses and industries that have contributed waste to now abandoned hazardous waste sites. "EPA's list of potential responsible parties who have actually caused the problem run from automobiles, banking, electronics and electrical manufacturing, furniture, aircraft and aerospace, optical products, computers, food, beverage and grocery manufacturers, paper and packaging product companies, airlines, rubber products, communications, textiles, and utilities." 131 CONG. REC. H11,080 (daily ed. Dec. 5, 1985) (statement of Rep. Breaux). Representative Moore (R-La.) has stated that EPA attributes only 13% of toxic waste sites to chemical companies' disposal practices. The remaining sites are created by a spectrum of users that normally are not considered to be in the business of generating hazardous wastes. According to Representative Moore, an EPA investigation of a hazardous waste site in Zionsville, Indiana revealed waste contributors that included Eli Lilly, Fred's Frozen Food, Coca-Cola, University of Minnesota, and the Indianapolis Department of Public Works. 131 CONG. REC. H11,106 (daily ed. Dec. 5, 1985) (statement of Rep. Moore). *See also* 132 CONG. REC. S14,908 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen (D-Tex.)).

⁵ 42 U.S.C. §§ 9601-9657 (1982 & Supp. II 1984).

⁶ Although the term "Superfund" is popularly used to refer to CERCLA in its entirety, the term more accurately applies to the Hazardous Substance Response Trust Fund that Congress established through CERCLA for the payment of governmental response costs. 42 U.S.C. §§ 9631-9633 (1982).

⁷ To provide EPA with the funds necessary for its investigations, remedial actions, and law suits against responsible parties, CERCLA provided for taxation of certain industries that generate hazardous substances. This funding mechanism expired on September 30, 1985. 42 U.S.C. § 9653 (1982). Unable to reach agreement on the terms of a reauthorization bill, Congress subsequently enacted two stopgap appropriation bills in 1985: Hazardous Substance Response Trust Fund, Repayable Advance, Pub. L. No. 99-270, 100 Stat. 80 (1986); Superfund Extension, Pub. L. No. 99-411, 100 Stat. 931 (1986). In October 1986, it enacted the Superfund Amendments and Reauthorization Act (SARA), which, among other provisions, extended funding for an additional five years. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1760-74.

⁸ Section 107(a) provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to

The magnitude of damage caused by improperly disposed hazardous wastes and the enormous cost of cleaning up contaminated waste sites prompted Congress to cast a broad net of liability in subsection 107(a).⁹ Among those caught in this net are "innocent" lender/owners—secured lenders who have acquired encumbered property without having participated in the dumping activities and who have not continued them. Potential liability of innocent lender/owners most often arises when a lender forecloses on property in which it holds a security interest and purchases the property at the foreclosure sale or when a lender accepts a deed to the property in settlement of the secured debt.

CERCLA has proven to be an unexpected source of liability for lenders, because this is the first time that a government agency has pursued lender/owners in court for conditions on the property. Although other federal¹⁰ and

disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i).

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D).

42 U.S.C. § 9607(a) (1982), *amended by* 42 U.S.C.A. § 9607 (West Supp. 1987) (addition of subparagraph D).

⁹ See *infra* note 19 and accompanying text.

¹⁰ See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1321(a)(6) (1982):

"[O]wner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment.

Deepwater Ports Act, 33 U.S.C. § 1517(m)(4) (1982) ("'[O]wner or operator' means any person owning, operating, or chartering by demise, a vessel."); Clean Air Act, 42 U.S.C. § 7411(a)(5) (1982) ("The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a stationary source."); Outer Continental Shelf Resource Management Act, 43 U.S.C. § 1811(19) (1982):

"[O]wner" means any person holding title to, or in the absence of title, any other indicia of ownership of, a vessel or offshore facility, whether by lease, permit, contract, license, or other form of agreement, or with respect to any offshore facility abandoned without prior approval of the Secretary of the Interior, the person who owned such offshore facility immediately prior to such abandonment, except that such term does not include a person who, without

state¹¹ environmental acts and regulations include a list of potentially liable parties that is similar to that contained in CER-

participating in the management or operation of a vessel or offshore facility, holds indicia of ownership primarily to protect his security interest in the vessel or offshore facility.

Financial Responsibility for Oil Pollution—Alaska Pipeline, 33 C.F.R. § 131.2(j) (1986) (“Owner” or “vessel owner” means any person holding legal or equitable title to a vessel; *Provided, however*, That a person holding legal or equitable title to a vessel solely as security is not an owner.” (emphasis in original)); Hazardous Waste Management System: General, 40 C.F.R. § 260.10 (1986) (“Owner” means the person who owns a facility or part of a facility.”).

¹¹ See, e.g., Massachusetts Oil and Hazardous Material Release Prevention and Response Act, MASS. GEN. L. ch. 21E, § 2 (1986):

“Owner” or “Operator”, (1) in the case of a vessel, any person owning, operating or chartering by demise such vessel, (2) in the case of a site, any person owning or operating such site, and (3) in the case of an abandoned site, any person who owned, operated, or otherwise controlled activities at such site immediately prior to such abandonment. The term shall not include a person, who, without participating in the management of a vessel or site holds indicia of ownership primarily to protect his security interest in said vessel or site.

Minnesota Environmental Response and Liability Act, MINN. STAT. § 115B.02(11) (1987):

“Owner of real property” means a person who is in possession of, has the right of control, or controls the use of real property, . . . provided that:
 . . . (3) Any person holding a remainder or other nonpossessory interest or estate in real property is an owner of the real property beginning when that person’s interest or estate in the real property vests in possession or that person obtains the unconditioned right to possession, or to control the use of, the real property.

New Hampshire Hazardous Waste Cleanup Fund, N.H. REV. STAT. ANN. § 147-B:2(VI) (Equity Supp. 1987) (“Generator” means any person who owns or operates a facility where hazardous waste is generated.”); New Jersey Major Hazardous Waste Facilities Siting Act, N.J. STAT. ANN. § 13:1E-51(n) (West Supp. 1987) (“[I]n addition to the usual meanings thereof, every owner of record of any interest in land whereon a major hazardous waste facility is or has been located, and any person or corporation which owns a majority interest in any other corporation which is the owner or operator. . . .”); New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11b(n) (West Supp. 1987):

“Owner” or “operator” means with respect to a vessel, any person owning, operating or chartering by demise such vessel; with respect to any major facility, any person owning such facility, or operating it by lease, contract or other form of agreement; with respect to abandoned or derelict major facilities, the person who owned or operated such facility immediately prior to such abandonment, or the owner at the time of discharge.

North Carolina Oil Pollution and Hazardous Substances Control Act, N.C. GEN. STAT. § 143-215.77(12) (1983) (“Operator” shall mean any person owning or operating an oil terminal facility or pipeline, whether by lease, contract, or any other form of agreement.”).

Interestingly, the Massachusetts and Minnesota Acts impose liability on the “owner or operator.” MASS. GEN. L. ch. 21E, § 5(a) (1987) (emphasis added), and MINN. STAT. § 115B.03(1) (1986) (emphasis added). Conversely, CERCLA imposes liability on the “owner and operator.” 42 U.S.C. § 9607(a)(1) (1982) (emphasis added). See *infra* notes 37–61 and accompanying text.

Many other states have enacted legislation imposing liability for hazardous waste cleanup costs. Although only the state acts listed *supra* actually define “owner,” several other state acts impose liability on the property owner. See, e.g., KY. REV. STAT. ANN. § 224.877(3), (4), (6)(a) (Michie/Bobbs-Merrill Supp. 1986); ME. REV. STAT. ANN. tit.

CLA, no reported decision exists in which the Environmental Protection Agency (EPA) or another authorized plaintiff has pursued a lender inside or outside the courtroom. Consequently, when two CERCLA cost recovery actions were filed against lenders that had held security interests in properties that EPA cleaned of hazardous wastes,¹² shock waves reverberated through the lending industry. Business journal articles and continuing legal education programs have since warned lenders of this unexpected source of liability and have counseled methods for attempting to avoid it.¹³

Lenders have been particularly concerned about the prospect of CERCLA liability. First, the cost of cleaning a hazardous waste site, especially when combined with the other elements of CERCLA damages, often and substantially exceeds the amount the lender agreed to invest against the security of the property. Indeed, such damage amounts often exceed the fair market value of the land even after it is cleaned of hazardous wastes. In such a case, a lender faces the possibility of a much greater economic burden than was anticipated when it made a loan secured by the contaminated property.

Second, many insurance companies have taken the position that commonly used comprehensive general liability policies do not include liability for hazardous waste related injuries and

38, § 1319-J (West Supp. 1986); MICH. COMP. LAWS ANN. § 299.541 (West 1984); N.Y. ENVTL. CONSERV. LAW § 27-1313(3)(a) (Consol. Supp. 1987); OHIO REV. CODE ANN. § 3734.22 (Anderson Supp. 1987); S.C. CODE ANN. § 44-56-60(b)(1)-(c)(2) (Law. Co-op. Supp. 1987); Texas Solid Waste Disposal Act, TEX. REV. CIV. STAT. ANN. art. 4477-7, § 8(g)(2)(A) (Vernon Supp. 1988); Texas Hazardous Substances Spill Prevention and Control Act, TEX. WATER CODE ANN. § 26.263(6) (Vernon Supp. 1988); WIS. STAT. ANN. § 144.76(3), (7) (West Supp. 1987). For a discussion of the impact of state hazardous waste laws on real estate transactions, see Angelo & Bergeson, *The Expanding Scope of Liability for Environmental Damage and its Impact on Business Transactions*, 8 CORP. L. REV. 101, 106-08 (1985); Dean, *How State Hazardous Waste Statutes Influence Real Estate Transactions*, [Current Developments] 18 Env't Rep. (BNA) No. 14, at 933 (July 31, 1987).

¹² United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); United States v. Mirabile, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985).

¹³ See, e.g., Angelo & Bergeson, *supra* note 11, at 113; Apple & Guthrie, *Caveat Emptor When it Comes to Super Fund Liability*, MINN. L.J. 11 (1987); Bleicher & Stonelake, *Caveat Emptor: The Impact of Superfund and Related Laws on Real Estate Transactions*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) No. 1, at 10,017 (Jan. 1984); Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L.J. 509 (1986); Richman & Stukane, *Avoiding the Environmental Risks in Mortgage Transactions*, 2 REAL EST. FIN. J. 13 (Winter 1987); Shea, *Protecting Lenders Against Environmental Risks*, PRAC. REAL EST. LAW. 11 (May 1987); Berz & Sexton, *Superfund Collides with Lenders' Concerns*, Legal Times, Dec. 23-30, 1985, at 13, col. 1.

cleanup costs. As a result, a lender that believed it was comprehensively covered against liability confronts the possibility of being a self-insurer for a large unanticipated liability.¹⁴

Surprisingly in light of the effects on lenders, Congress apparently did not consider the issue of lender/owner liability when it enacted CERCLA. Despite hundreds of pages of legislative history,¹⁵ not one reference exists to the lender/owner's potential liability.¹⁶ More surprisingly, SARA's legislative history also does not mention the issue although the opinions in earlier

¹⁴ For a discussion of the insurance issues that have arisen with respect to environmental liability, see Adler & Broiles, *The Pollution Exclusion: Implementing the Social Policy of Preventing Pollution Through the Insurance Policy*, 19 LOY. L.A.L. REV. 1251 (1986); Angelo & Bergeson, *supra* note 13, at 114; Bauer & Lakind, *Toward Resolution of Insurance Coverage Questions in Toxic Tort Litigation*, 38 RUTGERS L. REV. 677 (1986); *Toxic Waste Note, supra* note 4, at 1573-85; Note, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U. ILL. L. REV. 897; Annotation, *Liability Insurance Coverage for Violations of Antipollution Laws*, 88 A.L.R.3d 182 (1978).

¹⁵ It is somewhat inaccurate to refer to CERCLA's legislative history.

Although Congress had worked on "Superfund" toxic and hazardous waste cleanup bills and on parallel oil spill bills for over three years, the actual bill which became law had virtually no legislative history at all. The bill which became law was hurriedly put together by a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all other pending measures on the subject. It was then placed before the House, in the form of a Senate amendment of the earlier House bill. It was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take it-or-leave it basis, the House took it, groaning all the way.

Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982) (footnote omitted). See also Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253 (1981). Because of the limited time Congress had to consider CERCLA, no committee reports exist for the law as enacted. The floor debates constitute the only directly related legislative history. See *Bulk Distrib. Centers v. Monsanto Co.*, 589 F. Supp. 1437, 1441 (S.D. Fla. 1984) ("CERCLA's legislative history is riddled with uncertainty because lawmakers hastily drafted the bill and because last minute compromises forced changes that went largely unexplained.") (dicta). For this reason, one court has advised that "the Committee Reports must be read with some caution." *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982).

¹⁶ One Representative focused on the problem of lenders refusing loans to companies that may be subject to CERCLA liability, but he did not address the problem of the lenders' potential liability.

Financial institutions are extremely wary of lending capital for operations when the borrower may or may not be subject to huge liabilities created by the legal disposal of hazardous waste. The impact of this ripples through the economy as small business finds itself unable to borrow needed capital for expansion and investment due to the contingent liabilities generated under the CERCLA liability system.

131 CONG. REC. H11,091 (daily ed. Dec. 5, 1985) (statement of Rep. Brown (R-Colo.)).

CERCLA suits involving lender/owners were published before SARA became law.¹⁷

The references in the legislative histories concerning the scope of liability provide little insight into whether or to what extent Congress intended lender/owners to be subject to CERCLA liability. Although some statements in the legislative history indicate that Congress may have intended to impose liability only on an entity that generated, transported, or permitted dumping of hazardous materials,¹⁸ other relevant policy statements indicate that Congress did not intend to limit liability in this way.¹⁹ The legislative history includes statements by several

¹⁷ According to one commentator, the lenders' lobby did attempt to have Congress exempt lender/owners from liability.

Although bank lobbies attempted to persuade members of Congress to include in section 101(35) of the 1986 Superfund amendments a provision exempting mortgagees from liability when they acquire possession of land by foreclosure, members of the Senate were so hostile to the idea that it was never even formally considered in committee.

Telephone interview with Robert Norris, Legislative Assistant to Congressman Barney Frank (D-Mass.) (Nov. 14, 1986). Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879, 904 n.139 (1987). While Congress considered the 1986 amendments, the Federal Home Loan Corporation, a major purchaser in the secondary mortgage market, proposed an alternative definition of "contractual relationship" that would insulate a lender/owner from CERCLA liability if it did not have notice of the hazardous wastes when it made the loan secured by the polluted land. *Id.* at 907-08.

¹⁸ See, e.g., 132 CONG. REC. S14,934 (daily ed. Oct. 3, 1986) (statement of Sen. Durenberger (R-Minn.)) ("[Superfund] imposed strict, joint, and several liability on those who manufacture, handle, and dispose of hazardous substances."); S. REP. NO. 848, 96th Cong., 2d Sess. (1980); Letter from Douglas Costle to Sen. Randolph (D-W. Va.), (Sept. 25, 1979):

The supposition of the Administration's proposal is that society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefited from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created;

126 CONG. REC. 26,358 (1980) (statement of Rep. Findley (R-Ill.)) ("[H.R. 7020 would] . . . establish strict lines of liability for those who engage in the waste disposal business."); 126 CONG. REC. 26,339 (statement of Rep. Staggers (D-W. Va.)) ("[H.R. 7020] provides that defendants who caused or contributed to hazardous waste situations necessitating response action by the Administrator shall be strictly, jointly and severally liable for the costs of such action."); 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) ("The purposes of [S. 1480] were: First, to make those who release hazardous substances strictly liable for cleanup costs, mitigation, and third-party damages. . ."). The last two quotations can be interpreted as including a property owner who did not operate the dump and did not authorize anyone else to do so but, having failed to clean the site of hazardous wastes thereby necessitating an EPA cleanup, has "contributed to" and permitted the "release" of hazardous substances.

¹⁹ See, e.g., Senator Lautenberg's (R-N.J.) statements with respect to the CERCLA reauthorization bill:

Cleaning up these sites will be expensive. It will require assigning liability to the parties who contributed to the creation of these sites. And, it will require

members of Congress to the effect that "polluters should pay"²⁰ or that the parties "responsible" for a hazardous waste release should be liable.²¹

These statements are consistent with the statutory imposition of liability on a property owner that acquired a dump site but did not operate the dump, such as a lender/owner. Imposition of liability is, moreover, consistent with traditional precepts of property law. Historically, a property owner has been legally responsible for a hazardous condition existing on its land even if it did not create the condition. In this sense, the owner is deemed to be a tort-feasor. Although it did not create the hazardous condition, the owner is permitting the condition on its land to harm others.²²

In the absence of a clear congressional expression of intent concerning a lender/owner's liability for the cost of cleaning up a hazardous waste site, the resolution of the issue turns on the statutory language and that language's relationship with the policies underlying CERCLA. This Article will analyze CERCLA's liability provisions and will demonstrate that Congress intended that a lender/owner may be held liable for response costs. This Article then will establish that this potential imposition of liability is constitutional and is consistent with a landowner's—

a financial contribution from a range of parties, some of whom may not have contributed directly to our toxic waste problem, but all of whom have benefited from the products produced by the chemical and petroleum industries.

132 CONG. REC. S14,911 (daily ed. Oct. 3, 1986) (statement of Sen. Lautenberg).

²⁰ See, e.g., 132 CONG. REC. S14,932 (daily ed. Oct. 3, 1986) (statement of Sen. Wallop (R-Wyo.)) ("The cost of cleaning environmental problems should be based on the principle that the polluter should pay."); *id.* at S14,923 (statement of Sen. Chafee (R-R.I.)) ("[The funding proposal] is consistent with the principle of Superfund: the principle that the polluter pays."); 131 CONG. REC. H11,118 (daily ed. Dec. 5, 1985) (statement of Rep. Traficant (D-Ohio)) ("Polluters should pay the entire cost of cleaning the mess they created and the grave hazards they caused.").

²¹ See, e.g., 132 CONG. REC. S14,934 (daily ed. Oct. 3, 1986) (statement of Sen. Durenberger) ("When it was adopted in 1980, Superfund was designed to assure that those who are responsible for the release of hazardous substances into the environment would also bear the responsibility of responding to the threats that those substances pose. That was the theory of Superfund."); 131 CONG. REC. H11,117 (daily ed. Dec. 5, 1985) (Letter to Speaker of the House and Minority Leader from selected Members of Congress (Dec. 4, 1985) ("Liability is the most effective tool that EPA has for bringing the responsible parties to the bargaining table to negotiate a cleanup agreement.")); 126 CONG. REC. 26,338 (1980) (statement of Rep. Florio) ("[The liability provision] assures that the costs of chemical poison releases are borne by those responsible for the releases. It creates a strong incentive both for prevention of releases and voluntary cleanup of releases by responsible parties.").

²² See *infra* notes 190–237 and accompanying text. The monumental problems of proof and formidable procedural obstacles, such as statutes of limitations, however, can prevent recovery by hazardous waste victims. See Farber, *Toxic Causation*, 71 MINN. L. REV. 1219 (1987); *Toxic Waste Note*, *supra* note 4, at 1604–16.

including a lender/owner's—common law liability for the condition of its land. Finally, this Article will propose a relaxation of the usual common law rules concerning apportionment of damages in CERCLA-related contribution actions to apportion liability more equitably among the statutorily responsible parties.

II. CERCLA

Congress enacted CERCLA to deal with hazardous waste dump sites that are polluting neighboring lands or water sources. The Act and its related regulations authorize EPA either to order the responsible parties to contain the hazardous waste on the site²³ or to clean the site and charge the responsible parties for EPA's response costs.²⁴ The statutorily defined response costs include the cost of cleaning the site, any damages for injuries to natural resources, and the costs of any health assessment or health effects studies conducted pursuant to statutory authority.²⁵ If EPA cleans the site, it may recover its response costs from any one or more of the persons enumerated in subsections 107(a)(1)–(4) of the Act, including: (1) the current "owner and operator" of the waste site;²⁶ (2) any person who owned or

²³ 42 U.S.C. § 9606(a) (1982).

²⁴ *Id.*

²⁵ The recoverable response costs are enumerated in *id.* § 9607(a). *See supra* note 8.

²⁶ 42 U.S.C. § 9607(a)(1) (1982). Subsection 107(a)(1) does not specify when a person must have been the "owner or operator" for liability to attach. It merely provides that "the owner or operator of a vessel . . . or a facility" is liable for CERCLA response costs. This language can be construed to impose liability on the person who owned (1) after dumping stopped but before the cleanup, (2) during the cleanup, or (3) when the cost recovery action is filed. Those persons who owned during any dumping activities are liable pursuant to § 107(a)(2). *Id.* § 9607(a)(2). EPA correctly interprets § 107(a)(1) as imposing liability only on the person who was the owner during the cleanup. S. Leifer, EPA Deputy Associate Enforcement Counsel for Waste, Office of Enforcement & Compliance Monitoring, Paper presented at Environmental Risks for Lenders Conference entitled Lender Liability Under CERCLA 2 (June 25, 1987) [hereinafter Leifer Paper] (on file at the Harvard Journal on Legislation). Courts also have construed § 107(a)(1) in the same way. *United States v. Cauffman*, 21 Env't Rep. Cas. (BNA) 2167 (C.D. Cal. 1984) (owner at time of cleanup liable); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044–45 (2d Cir. 1985) (owner at time of cleanup liable although did not own at time of disposal). This interpretation is consistent with the economics of imposing liability on an owner who did not participate in or permit dumping. The owner during the cleanup benefited by the increase in fair market value attributable to the cleanup, whereas a person who subsequently purchases the property presumably has paid a price that reflects the uncontaminated value of the property. If the owner during the cleanup purchased without notice of the waste on the property and paid the uncontaminated value for the land, it will escape liability pursuant to the third-party defense if it exercised reasonable care after discovering the waste. 42 U.S.C. § 9607(b)(3) (1982). Furthermore,

operated the waste site when any hazardous dumping occurred; (3) the hazardous waste generators; and (4) the hazardous waste transporters.²⁷ Liability for response costs is strict, joint, and several with limited exception.²⁸

The terms "owner and operator" in subsection 107(a)(1) are generic and unmodified.²⁹ Therefore, a lender that acquires title to a hazardous waste site, whether by foreclosure or by other means, potentially is liable for CERCLA response costs even though the lender did not participate in operation of the site or in generating or transporting the waste at the site. Liability follows title as it does under the common law. Under this theory, lenders who acquired title to encumbered property by foreclosure have been sued as "owners" in two response cost recovery actions.³⁰ Because lender/owners will usually be easy to locate

the owner during the cleanup, if liable for response costs, could have avoided that liability by cleaning the site rather than waiting for EPA or another responsible party to do so. Subsection 9604(a)(1) authorizes the government to clean a hazardous waste site "unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates. . . ." *Id.* § 9604(a)(1). Note that this alternative is unavailable to a person who acquires the site after a cleanup. Imposing liability on the owner during the cleanup also is consistent with the common law tort liability of a landowner, whereas such liability does not attach to a person who acquires property after the hazardous condition has been eliminated. *See infra* notes 190-237 and accompanying text. No reported decision involves a suit against a person who acquired a waste site after an EPA cleanup.

The third class of owners, those who did not own during dumping and sold before the cleanup, were not subject to liability under CERCLA as originally enacted, although they may be liable pursuant to the CERCLA amendments. In *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,376, 20,378 (C.D. Cal. 1984), the court stated the pre-SARA law:

This defendant argues on this motion that the scope of liability of the Act is not so broad as to encompass a party who merely owned the site at a previous point in time, who neither deposited nor allowed others to deposit hazardous wastes on the site. This appears to be correct under any but a very strained reading of the Act.

That former innocent owners were not liable under CERCLA as originally enacted is further demonstrated by the SARA amendment that provides one circumstance under which such an owner will be liable for response costs. New § 101(35)(c) provides that such an owner will be liable if it had actual knowledge of a release or threatened release from the property but did not disclose that condition to the person who acquired title from it. 42 U.S.C.A. § 9601(35)(c) (West Supp. 1987). Such an amendment would have been unnecessary if this class of owners already were liable under § 107(a)(1).

²⁷ *See supra* note 8.

²⁸ *See infra* notes 239-74 and accompanying text. Although courts and commentators frequently state that CERCLA imposes strict liability, liability is less than strict. An otherwise responsible party will not be liable for CERCLA response costs if it can establish that the hazardous condition was caused solely by an act of God, an act of war, or an unrelated third party. 42 U.S.C. § 9607(b) (1982 & Supp. II 1984). The third-party defense is discussed at *infra* notes 115-43 and accompanying text.

²⁹ 42 U.S.C. § 9607(a)(1) (1982).

³⁰ *See infra* notes 89-113 and accompanying text.

and to join in a response cost recovery action and will generally have sufficiently deep pockets to pay a judgment against them, lender/owners will continue to be attractive defendants and more suits are likely.

If the lender participated in operation of the waste site, whether before or after acquiring the site, it may be liable as an "operator." In *United States v. Mirabile*, for example, a federal district court stated that a secured lender could incur CERCLA liability as an "operator" if it had been actively engaged in its borrowers' business operations.³¹ A lender/owner also bears potential tort liability for injuries resulting from the condition of the land and for any failure to disclose that condition when it sells the land.³²

If the lender/owner is not potentially liable as an operator, but only as an owner, however, it has at least four plausible arguments to attempt to avoid CERCLA liability: (1) subsection 107(a)(1) imposes liability only on owners that also are operators;³³ (2) pursuant to an exception in the Act's definition of "owner or operator," the lender is not liable because it acquired title primarily to protect its security interest;³⁴ (3) the lender qualifies for the subsection 107(b)(3) third-party defense;³⁵ and (4) imposition of liability on a lender/owner is unconstitutional.³⁶ As will be demonstrated, the third-party defense is the only viable argument to avoid liability, and the exception it offers is narrow.

A. Subsection 107(a)(1)—"The Owner and Operator"

Subsection 107(a)(1) provides that "the owner and operator" of a waste site is liable for CERCLA response costs.³⁷ The Act broadly and circularly defines "the owner or operator" as a person who owns, operates, charters, or otherwise controls a

³¹ 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994, 20,997 (E.D. Pa. 1985).

³² 42 U.S.C.A. § 9601(35)(C) (West Supp. 1987). See *infra* note 140 and accompanying text.

³³ See *infra* notes 37–61 and accompanying text.

³⁴ See *infra* notes 63–113 and accompanying text.

³⁵ See *infra* notes 115–43 and accompanying text.

³⁶ See *infra* notes 146–89 and accompanying text.

³⁷ 42 U.S.C. § 9607(a)(1) (1982).

vessel or facility.³⁸ In *United States v. Maryland Bank & Trust Co.*,³⁹ a CERCLA response cost recovery action against, among others, a lender/owner, the lender/owner argued that subsection 107(a)(1) imposes liability on a property owner only if that person also is an operator. The defendant argued that the conjunctive "and," together with use of the article "the" before the word "owner" but not before the word "operator," provided that an owner is liable only if it also is an operator.⁴⁰

The court was unreceptive to the defendant's grammar-based argument, noting that "by no means does Congress always follow the rules of grammar when enacting the laws of this nation."⁴¹ An authority on statutory construction, as well as a grammarian, provide support for the court's finding of potential liability for non-operating owners in the statute's language.⁴² With respect to the use of "and" rather than "or," a leading authority on statutory construction states: "There has been . . . [such] great laxity in the use of these terms that courts have generally said that the words are interchangeable and that one may be substituted for the other, if consistent with the legislative intent."⁴³ With respect to the absence of the second "the" in the liability provision, H.W. Fowler has stated in his classic work, *A Dictionary of Modern English Usage*, that insistence on "the" being placed before each noun in a series is an example of "needless rigidity."⁴⁴ This type of statutory flyspecking is par-

³⁸ Section 9601(a)(20) provides:

"[O]wner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Id. § 9601(a)(20). The security interest exception is discussed later in this Article. See *infra* notes 63–111 and accompanying text.

³⁹ 632 F. Supp. 573, 577–78 (D. Md. 1986).

⁴⁰ See *id.* at 577.

⁴¹ See *id.* at 578.

⁴² See, e.g., 1A SUTHERLAND, STATUTORY CONSTRUCTION § 21.14, at 127 (4th ed. 1985); H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 630–31 (2d ed. 1965).

⁴³ 1A SUTHERLAND, *supra* note 42, § 21.14, at 127.

⁴⁴ Fowler writes:

What may fairly be expected of us is to realize that among expressions of several adjectives or nouns introduced by *the* some obviously cannot have *the* repeated with each item without changing the sense (*the black and white penguins*), and some can logically claim the repetition (*the red and the yellow tomatoes*). A careful writer will have the distinction in mind, but he will not

ticularly rigid in light of CERCLA's generally acknowledged drafting deficiencies.⁴⁵

Placing the language used in subsection 107(a)(1) in context suggests that its adoption was the result of a drafting deficiency. First, construing subsection 107(a)(1) as imposing liability on an "innocent" owner is necessary to make section 107 internally consistent. For example, subsections 107(c)(1) and 107(c)(2), which provide the amount of chargeable response costs, both refer to the liability of an "owner or operator."⁴⁶ These provisions contemplate that an owner need not be an operator to be liable for response costs.

Second, Congress used the subsection 107(a)(1) phrase "the owner and operator" in other subsections that clearly contemplate the possibility of two different persons filling these roles. Subsection 107(k)(2), for example, provides that if "the owner or operator" of a facility notifies EPA that specified conditions for transferring liability have been satisfied, such transfer will be effective unless EPA otherwise notifies "the owner and operator," in which case "the owner and operator" continue to be liable.⁴⁷

necessarily be a slave to logic; "the red and yellow tomatoes" may be preferred for better reasons than ignorance or indolence. For other attempts to impose a needless rigidity, see ONLY and NOT I.

H.W. FOWLER, *supra* note 42, 630-31 (emphasis in original).

⁴⁵ Several courts and commentators have noted the Act's drafting deficiencies. *See, e.g.*, 632 F. Supp. at 578 (D. Md. 1986); *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1441 & n.10 (S.D. Fla. 1984); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984), *rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987) [hereinafter NEPACCO]; Eckhardt, *supra* note 15, at 253. These drafting deficiencies are explained, in part, by the Act's legislative history. CERCLA was a compromise package of other bills that coalesced in last minute negotiations. Grad, *supra* note 15, at 1-2. *See infra* note 54.

⁴⁶ Subsection 9607(c)(1)-(2) provides:

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance. . . .

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if. . . .

⁴² U.S.C. § 9607(c)(1)-(2) (1982 & Supp. II 1984) (emphasis added). *See also id.* §§ 9607(e)(1)-(2), (h), (k)(1).

⁴⁷ Subsection 9607(k)(2) provides:

Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency . . . that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator . . . determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate

Finally, because no question exists that a waste site operator is liable for CERCLA response costs, a grammarian would be hard pressed to explain why Congress imposed liability on owners and operators rather than on operators alone, unless it intended to impose liability on an owner who was not also an operator. In fact, interpreting subsection 107(a)(1) as imposing liability only on an owner who also is an operator would cause that provision to be mere surplusage, because subsection 107(a)(2) imposes liability on "any person who . . . owned or operated" a facility when any dumping occurred.⁴⁸ Thus, if a court employs the rule of construction that statutory language should be construed in a manner that does not render a clause superfluous,⁴⁹ the court should interpret subsection 107(a)(1) as imposing liability on the current owner even if that person did not operate the facility.

An examination of a statute's legislative history may help resolve ambiguities in the text.⁵⁰ Although the legislative history for CERCLA as enacted is sparse,⁵¹ the floor debates on the Act indicate that Congress intended to impose liability on an owner regardless of whether that person also is an operator. For example, Congressman Broyhill (R-N.C.) stated: "[U]nder the language of section 107 the owner *or* operator of a vessel or a facility can be held strictly liable for various types of costs and damages entirely on the basis of having been found to be an owner *or* operator of any facility or vessel."⁵² This conclusion is firmly buttressed by the legislative history accompanying

such compliance, the Administrator . . . shall so notify *the owner and operator* of such facility . . . , and *the owner and operator* of such facility shall continue to be liable. . . .

Id. § 9607(k)(2) (emphasis added).

⁴⁸ *Id.* § 9607(a)(2).

⁴⁹ 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.06, at 104 (4th ed. 1984). *See also* United States v. Bear Marine Servs., 509 F. Supp. 710 (E.D. La. 1980) (construing a provision of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982)). The court noted that (like CERCLA's legislative history) the Water Pollution Control Act's legislative history was unclear and reflected the "'give and take' of the legislative process, and the imprecision of group-undertaken drafting." *Id.* at 713. The court further stated: "Unfortunately, there is a dearth of legislative history as to Subpart (2). And, yet, as this Court has already observed, it 'has got to mean something.' It is the obligation of this Court to give meaning to each and every portion of a legislative act." *Id.* at 716.

⁵⁰ 2A SUTHERLAND, *supra* note 49, at 278.

⁵¹ *See supra* note 15.

⁵² 126 CONG. REC. 31,969 (1980) (statement of Rep. Broyhill (R-N.C.)) (emphasis added). *See also supra* notes 17-19.

CERCLA's reauthorization⁵³ and by the language of the bills that coalesced to form CERCLA.⁵⁴

⁵³ See, e.g., Explanation of Purpose and Intent of the Judiciary Committee Report, 131 CONG. REC. H11,083, H11,086 (daily ed. Dec. 5, 1985):

[The specified criteria] do not easily apply to a landowner who is liable as an "owner" of a "facility" under section 107(a), but who otherwise may be minimally related to the hazardous substance problem at the facility. Therefore, new subsection 122(g)(1)(B) provides that landowners may qualify for these expedited settlements. The criteria for this type of de minimis settlement require that the potentially responsible [sic] party: (1) own the real property on or in which the facility is located; (2) not have conducted or allowed the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and (3) not have contributed to the release or threatened release through any act or omission.

See also 131 CONG. REC. H11,082 (daily ed. Dec. 5, 1985) (statement of Rep. Rodino (D-N.J.)) ("[T]he committee amendments encourage EPA to settle with—and not to sue— . . . individuals who became owners of land without any knowledge or responsibility for the fact that it contained a hazardous waste site.").

⁵⁴ Three bills were the foundation of CERCLA: H.R. 85, 96th Cong., 2d Sess., 126 CONG. REC. 26,369-92 (1980); S. 1480, 96th Cong., 1st Sess., 125 CONG. REC. 17,989 (1979), and H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. 26, 757 (1980). For a legislative history of H.R. 85, see Grad, *supra* note 15, at 3-4. For a legislative history of S. 1480, see *id.* at 6-14, 29-35; ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, SENATE COMM. ON ENV'T AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVTL. RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUB. L. 96-510, vol. 1 at 462 (Comm. Print 1983) (October 1, 1980 draft); 126 CONG. REC. 30,916 (1980). For a legislative history of H.R. 7020, see Grad, *supra* note 15, at 4-6, 14-18, 29-35; ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, SENATE COMM. ON ENV'T AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVTL. RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUB. L. 96-510, vol. 2 at 3 (Comm. Print 1983) (as introduced on April 2, 1980); *id.* at 138 (as reported); *id.* at 391 (as passed by the House). For merger of three bills to form CERCLA, see 126 CONG. REC. 30,113 (1980) (statement of Sen. Stafford) ("This compromise [CERCLA] incorporates those parts of S. 1480, H.R. 7020 and H.R. 85 on which there is broad consensus.").

Like CERCLA, H.R. 85 imposed liability for "response costs" on the owner and the operator of a vessel or facility. The bill separately defined "owner" and "operator." H.R. 85, 96th Cong., 2d Sess. § 101(x)-(y), 126 CONG. REC. 26,369-392 (1980). The definition of "operator" clearly indicates that the "owner" and "operator" will be different entities. H.R. 85 defines an "operator" as:

- (1) [I]n the case of a vessel, a charterer by demise or any other person, except the owner who is responsible for the operation, manning, victualing, and supplying of the vessel, or
- (2) in the case of a facility, any person, *except the owner*, responsible for the operation of the facility by agreement with the owner. . . .

Id. (emphasis added). A Committee Report accompanying H.R. 85 reiterates this distinction between an "owner" and an "operator": "In the case of a facility, an 'operator' is defined to be a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement." HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES, H. R. REP. NO. 172, PART 1, 96th Cong., 1st Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS, 96th Cong., 2d Sess. 6160, 6182 [hereinafter COMMITTEE REPORT ON H.R. 85, PART 1]. See also 1980 U.S. CODE CONG. & ADMIN. NEWS, 96th Cong., 2d Sess. 6174 ("Under the scheme developed in the bill, the owner or operator of the vessel or facility . . . is in the best position to prevent and control a polluting discharge." (emphasis added)); 125 CONG. REC. 384-386 (1979) (statement of Rep. Biaggi (D-N.Y.)) ("[T]he bill imposes . . . liability on the owner or operator. . . ." (emphasis added)). Furthermore, the Committee Report refers to owners forming "one

Moreover, interpreting subsection 107(a)(1) to include lender/owners not only is consistent with CERCLA's legislative history but also promotes CERCLA's goals. In light of the enormous costs of cleaning hazardous waste sites and of the remedial actions necessary to stem the pollution that has seeped from them, Congress necessarily spread liability widely. Before CERCLA, participants in the hazardous waste industry had avoided internalizing all the costs associated with their operations. Waste site owners and operators did not create leakproof sites because of an ignorance of the effects of improperly disposed waste, a virtual dearth of safe disposal technology, and, importantly, an absence of effective legal sanctions. For similar reasons, waste generators and transporters often did not safely package and ship hazardous materials.

By imposing liability on every person who benefited from the dumping activities, CERCLA forces each to internalize the costs caused by unsafe disposal practices and to use safer disposal methods to avoid future liability. Thus, section 107 imposes liability not only on those persons who benefited directly from

of the three major classes (the others being operators and guarantors) subject to liability under the Act." COMMITTEE REPORT ON H.R. 85, PART I, *supra*, at 6181. *Cf.* statement by Representative Harsha (R-Ohio):

I would like to discuss two provisions for the purpose of establishing legislative history. The first is the definition of "owner" contained in title I of H.R. 85. During consideration of this measure by the Public Works Committee I offered an amendment to clarify the definition, as reported by the Committee on Merchant Marine and Fisheries. This change was necessary because the original definition inadvertently subjected those who hold title to a vessel or facility, but do not participate in the management or operation and are not otherwise affiliated with the person leasing or operating the vessel or facility, to the liability provisions of the bill.

While the Merchant Marine Committee report indicated this situation was not intended the statutory language is unclear. Therefore, I offered clarifying language to truly exempt those who hold title but do not participate in the operation or management activities. My amendment also requires that those that hold title cannot be affiliated [sic] in any way with those who lease or charter the vessel or facility. This was done to prevent the establishment of "dummy" corporations, with few assets, which would be the responsible party for the purpose of the act.

126 CONG. REC. 26,210-12 (statement of Rep. Harsha) (1980). In contrast to H.R. 85, S. 1480 simply incorporated by reference the Clean Water Act's definition of "owner or operator," which is reproduced at *supra* note 10. That particular definition is virtually identical to CERCLA's definition, though it does not include CERCLA's security interest exception.

H.R. 7020 does not provide a definition of "owner" or of "operator." Instead, it defined a "responsible party" for purposes of liability as including a person who "owned or operated such site at the time during which it was utilized for the treatment, storage, or disposal of any hazardous waste. . . ." H.R. 7020, § 3041(b)(1), 96th Cong., 2d. Sess., 126 CONG. REC. 26,757 (1980). The bill's use of the disjunctive denotes that different persons may be the owner and the operator and that both classes of persons may be liable under the terms of the bill.

the hazardous dump—the waste generators, transporters, and waste site operators—but also on those persons who benefited indirectly by operation of the waste site, including a site owner who does not directly operate it.⁵⁵ Courts have imposed section 107 liability on a lessor whose tenant operated a waste site although the lessor did not participate in its operation.⁵⁶ In one section 107 case, the court even held a sublessor liable as an “owner” for damages caused by its sublessee’s operations even though a sublessor does not own the land.⁵⁷ Although a landlord does not benefit directly from its tenant’s waste site operations, it does benefit from rental payments generated by those operations. Holding a landlord liable also removes the economic incentive for a property owner to avoid CERCLA liability by leasing the waste site to a subsidiary or other controlled entity.

The same theories apply to lenders that lend to hazardous waste site owners. If the loan was made to finance the acquisition or operation of the site, the lender’s situation is analogous to the landlord’s. Just as the landlord benefits from rental payments generated by the hazardous waste operations, so the lender benefits from principal and interest payments generated by operation of the site. Even if the loan was for a purpose unrelated to operation of the site, the operation is aided because the loan frees the operator’s capital for use at the site. Furthermore, as with the landlord, holding a lender/owner liable for response costs eliminates the economic incentive for a waste

⁵⁵ 42 U.S.C. § 9607 (1982 & Supp. II 1984).

⁵⁶ *Caldwell v. Gurley Refining Co.*, 755 F.2d 645 (8th Cir. 1985); *Sand Springs Home v. Interplastic Corp.*, 25 Env’t Rep. Cas. (BNA) 2127 (N.D. Okla. 1987); *United States v. Argent Corp.*, 14 Env’t. L. Rep. (Env’t. L. Inst.) 20,616 (D.N.M. 1984); *NEPACCO*, 579 F. Supp. 823, 845 n.26 (W.D. Mo. 1984), *aff’d in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). The landlord cases have involved § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1982), rather than § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1982). Subsection 107(a)(2) imposes liability on “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. . . .” 42 U.S.C. § 9607(a)(2) (1982).

Courts have been equally expansive in their interpretations of parties who are liable as “operators.” Despite customary legal deference to corporate form, courts have held that corporate officers and shareholders can be personally liable for § 107 damages if they were personally involved in the activities creating CERCLA liability. *See, e.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985); *NEPACCO*, 579 F. Supp. at 849; *United States v. Carolawn Co.*, 14 Env’t. L. Rep. (Env’t. L. Inst.) 20,699, 20,700 (D.S.C. 1984); *United States v. Wade*, 577 F. Supp. 1326, 1341 (E.D. Pa. 1983). Similarly, one court has held that an institutional lender may be liable as an “operator” because of its participation in management of a hazardous waste site. *United States v. Mirabile*, 15 Env’t. L. Rep. (Env’t. L. Inst.) 20,994, 20,997 (E.D. Pa. 1985).

⁵⁷ *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1984).

site operator to acquire title to the site in the name of a shell corporation, to "lend" the shell corporation the necessary operating capital, and then to acquire title to the site in settlement of the loan after dumping activity at the site has terminated.

The lender's CERCLA liability is not triggered by an indirect benefit alone, however. Like the landlord who owns the property, the lender's liability is premised on its ownership of the site. Under the statutory scheme, the lender will be liable only if it enjoys the direct benefit of a cleanup that occurs while it owns the site, if it acquired the site with notice of the waste, or if it attempted to avoid liability by selling the property to an innocent purchaser for a price that presumably represented the fair market value of uncontaminated property.⁵⁸ Although the amount of response costs normally will not be fully reflected in the increase in the land's fair market value, its value will undeniably be enhanced. Moreover, such liability is not absolute. As described below, a lender/owner can avoid all liability for response costs if it can establish the third-party defense of subsection 107(b)(3),⁵⁹ and a contribution action is available if it cannot avoid liability.⁶⁰

Imposing CERCLA liability on lender/owners also furthers CERCLA's goals by creating substantial incentives for lenders to act as hazardous waste watchdogs. If a lender determines that a parcel of land contains hazardous wastes, a knowledgeable lender should refuse to accept the land as collateral unless the potential borrower proves that the waste is properly contained, even if the lender intends to sell the loan on the secondary mortgage market.⁶¹ The security otherwise is valueless. In

⁵⁸ Subsection 101(35)(C) provides that a former property owner is liable for response costs if it knew of a release or threatened release before selling the property but transferred ownership "without disclosing such knowledge. . . ." 42 U.S.C.A. § 9601(35)(C) (West Supp. 1987). See *infra* note 140 and accompanying text.

⁵⁹ See *infra* notes 115-43 and accompanying text.

⁶⁰ See *infra* notes 248-74 and accompanying text.

⁶¹ Like an originating lender, a secondary market buyer must be concerned with potential CERCLA liability. Although secondary market mortgage purchasers are a step removed from the loan transaction and may be unfamiliar with the secured land, they are treated the same as any other lender/owner. Thus, under SARA's "contractual relationship" definition, a secondary market mortgage purchaser that forecloses and acquires title to the encumbered property will be unable to assert the third-party defense if it had actual or constructive notice of the hazardous wastes on the site when it foreclosed. 42 U.S.C.A. § 9601(35)(c) (West Supp. 1987). See *infra* notes 115-35 and accompanying text. During Congress' consideration of SARA, Federal Home Loan Corporation, one of the largest buyers in the secondary market, proposed a definition of "contractual relationship" that would protect a lender/owner if it was unaware of the hazardous wastes on the encumbered land when the loan was made. See *supra* note 17.

the absence of this proof, the lender will refuse to make the loan, will charge a higher interest rate, or will require additional collateral. If the loan is for operating expenses or for acquisition of a waste site, the lender may condition the loan on the borrower's agreement to dispose of hazardous wastes in a safe manner. These results will have the beneficial effects of putting some unsafe operators out of business or, by charging unsafe owners higher interest rates, of forcing them to internalize some of the costs generated by their operations.

The results of lender/owner liability have a darker side, however. For example, if a dump site owner or operator is unable to borrow funds, it may have insufficient capital to clean the site or to upgrade its operations by investing in new disposal technologies. That result is diametrically opposed to CERCLA's aims. Additionally, to satisfy the lender's inquiry concerning the land, the site owner or operator will have an incentive to falsify documents concerning the wastes it has accepted and its disposal methods, a practice that will hinder future cleanup efforts. Furthermore, waste site operators may refuse to accept especially toxic wastes or may charge higher prices for them, thereby increasing the incidence of illicit, "midnight" dumping of the worst forms of hazardous waste. Based on the current state of knowledge concerning CERCLA's impact on lenders' decision-making, however, these potential problems provide insufficient reason to exempt lender/owners from CERCLA's liability provisions. To determine whether imposing liability on lender/owners will further CERCLA's goals in the long term would require a detailed economic analysis, which is beyond the scope of this Article.

By its terms, subsection 107(a)(1) imposes liability for response costs on a property owner. Any argument that an owner is liable only if it operated the leaking waste site is negated by reference to the well-established rules of statutory construction, the legislative history of CERCLA, and the economics of hazardous waste site cleanups. Subsection 107(a)(1) affords no relief to an owner merely because it acquired the property in connection with a loan relationship. As described below, however, the Act's definition of an "owner or operator" protects lenders who acquire title to land solely by reason of the loan relationship.

The effect of the potential liability of secondary mortgage market purchasers will be to reduce the flow of capital from the secondary market to the loan originators.

B. Subsection 101(20)(A): Security Interest Exception

The second argument lender/owners have used to attempt to avoid CERCLA liability is based on the Act's definition of "owner or operator." Subsection 101(20)(A) broadly defines the terms "owner or operator" to include any person owning or operating a vessel or facility.⁶² The definition expressly excludes "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."⁶³ A person who satisfies the terms of this security interest exception is not liable as an owner or operator pursuant to subsection 107(a)(1).⁶⁴ Not surprisingly, lender/owners sued for response costs have argued that they acquired the contaminated property to protect their security interests and, therefore, are not liable.⁶⁵ This argument is flawed in two fundamental ways.

First, the security interest exception applies only while a person holds mere "indicia of ownership." When a lender acquires the waste site, it owns a qualitatively different interest in the land than mere indicia of ownership. Examination of the purpose for the security interest exception and of the mortgage law context in which it exists reveals that the exception is directed to this qualitative difference between ownership of land and of a mortgage. The purpose of the exception is to ensure that mortgage holders are treated similarly under the Act despite differing state law treatments of the interests created by a mortgage.

In the majority of states, those denominated lien theory states, state law characterizes a mortgage as conveying no title to the land.⁶⁶ Rather, the mortgage in these states creates only the right to sell the encumbered land in case of default.⁶⁷ A mortgage

⁶² 42 U.S.C.A. § 9601(20)(A) (West Supp. 1987). The subsection is reproduced at *supra* note 38.

⁶³ *Id.* The Act does not similarly except from the definition of owner a trustee of a land trust. In some states, property often is held in a land trust, with the trustee holding legal title. Angelo & Bergeson, *supra* note 11, at 107 n.13a. Although CERCLA does not expressly except the trustee from liability, a trustee has a strong argument that it does not "own" the property. A trustee with active involvement in the property's management, however, may be subject to liability.

⁶⁴ 42 U.S.C. § 9607(a)(1) (1982).

⁶⁵ *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578-80 (D. Md. 1986); *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994, 20,996 (E.D. Pa. 1985).

⁶⁶ Burkhardt, *Freeing Mortgages of Merger*, 40 VAND. L. REV. 283, 327 (1987).

⁶⁷ *Id.* at 321-27.

holder in these states would not be an owner under subsection 107(a)(1).⁶⁸ In a few other states, denominated title theory states, however, state law characterizes a mortgage as actually conveying title to the encumbered land to the lender.⁶⁹ Normally, a lender in a title theory state will not take possession of the property or otherwise hold itself out as being the owner of the property, but the mortgage, by its terms or by operation of common law, nevertheless invests the lender with indicia of ownership. If CERCLA equated title with ownership, similarly situated mortgage holders would be liable as owners in some states but not in others. The security interest exception eliminates this potential for unequal treatment. As long as a mortgage holder has no greater interest in the encumbered land than the mortgage, it will not be liable as an owner.

Although the distinction between title and indicia of ownership is a technical one, examination of the language of subsection 101(20)(A) as a whole reveals that Congress intended to draw this distinction. The first sentence of the "owner or operator" definition provides that an owner is a person "owning" the affected property or who "owned" the property in the case of abandoned property, whereas the security interest exception provided in the next sentence of the definition applies to a person who "holds indicia of ownership."⁷⁰ A reference to holding only indicia of ownership indicates that, although the holder possesses an instrument indicating a conveyance of title to it, such ownership is not ownership in the usual sense but is given to serve another purpose—in this case, to secure a loan. The logical conclusion is that the security interest exception applies only to holders of security interests and not to persons who own property.

The legislative histories of the three bills that formed the foundation of CERCLA further support the conclusion that Congress intended to distinguish between ownership for all purposes and title as mere indicia of ownership. H.R. 85, the Comprehensive Oil Pollution Liability and Compensation Act,⁷¹ for example, includes a definition of owner that is similar to that contained in CERCLA but with an important difference. The references in CERCLA to ownership and to holding indicia of

⁶⁸ 42 U.S.C. § 9607(a)(1) (1982).

⁶⁹ Burkhardt, *supra* note 66, at 328.

⁷⁰ 42 U.S.C. § 9601(20)(A) (1982).

⁷¹ H.R. 85, 96th Cong., 1st Sess., 126 CONG. REC. 26,369-92 (1980).

ownership are contained in separate sentences, thereby creating a possible inference that Congress' reference to indicia of ownership in the second sentence was a drafting error. The definition in H.R. 85, however, demonstrates that Congress was cognizant of the difference between the terms. "Owner" is defined in H.R. 85 as:

[A]ny person holding title to, *or, in the absence of title, any other indicia of ownership* of, a vessel or facility, but does not include a person who, without participating in the management or operation of a vessel or facility, *holds indicia of ownership* primarily to protect his security interest in the vessel or facility.⁷²

The Committee Reports concerning H.R. 85 echo this distinction between title and indicia of ownership in their discussions of the "owner" definition.⁷³ Similarly, the two other bills that eventually joined to form CERCLA each contained a definition of owner that reflects the distinction between ownership and possession of mere indicia of ownership.⁷⁴ The distinction undercuts the lender/owner's first argument that it is protected from CERCLA liability based on the security interest exception. Once the lender/owner acquires the property at a foreclosure sale or by voluntary settlement, it no longer holds mere indicia of ownership; instead, it owns the property and is liable as an owner.

Notwithstanding the legislative history of the "owner or operator" definition, the phrase "primarily to protect his security interest" provides lender/owners sufficient room for a second argument against CERCLA liability based on subsection 101(20)(A).⁷⁵ They may argue that the statutory exception is broad enough to include a lender that acquires the land to ensure repayment of the loan. When a lender forecloses its security interest and purchases the property at the foreclosure sale or when it otherwise acquires title in satisfaction of the secured debt, it usually does so "primarily to protect" its interest in the property.⁷⁶ Because most lenders are not in the business of

⁷² *Id.* (emphasis added).

⁷³ HOUSE COMMITTEE ON PUBLIC WORKS & TRANSPORTATION, H.R. REP. NO. 172, PART 2, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6212, 6213; COMMITTEE REPORT ON H.R. 85, PART 1, *supra* note 54, at 6181.

⁷⁴ H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. 26,757-99 (1980); S. 1480, 96th Cong., 1st Sess. (1979), 126 CONG. REC. 30,898-987 (1980).

⁷⁵ 42 U.S.C. § 9601(20)(A) (1982).

⁷⁶ Burkhardt, *supra* note 66, at 331-32.

acquiring land and managing it for its investment potential, lenders normally resort to foreclosure or accept encumbered land in settlement of the debt only when the debtor is unable to repay the loan or when state law prohibits a lender from pursuing personal liability until it has attempted to satisfy the debt from the collateral securing it. Particularly when the defaulting debtor has abandoned the property or is mismanaging it, a lender may conclude that unless it intervenes to put the property ownership in new hands, the value of the lender's security interest and the lender's chances of repayment in full from a sale of the land will also deteriorate.

While the argument may be consistent with a lay person's first reading of the statute, it is contradicted by the statute's wording and legislative history,⁷⁷ which demonstrate that Congress did not use the phrase "primarily to protect his security interest" to refer to the lender's reasons for acquiring title to the encumbered land. Instead, the phrase refers to the lender's reasons for accepting a mortgage in those jurisdictions that treat a mortgage as conveying indicia of ownership to the encumbered land. The placement of the phrase in the statute strongly supports this conclusion: "[O]wner or operator' . . . does not include a person, who . . . holds indicia of ownership primarily to protect his security interest. . . ."⁷⁸ As discussed above, the term "indicia of ownership" refers in this context to a mortgage interest in the title theory states. As can be seen, the "primarily" phrase specifies when a mortgage holder will be free of liability as an owner. As an exception to a statutory imposition of liability, the security interest exception must be strictly construed.⁷⁹ Therefore, once a lender holds more than mere indicia of ownership, as it does when it buys the property, it no longer qualifies for the exception.

The legislative history of subsection 101(20)(A) further demonstrates that the particular placement of the "primarily" clause was not the result of imprecise drafting; a Committee Report concerning H.R. 85, which included a definition of owner similar to CERCLA's, states that the term "owner" does not include "certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the manage-

⁷⁷ See *supra* note 54 (sources of CERCLA).

⁷⁸ 42 U.S.C. § 9601(20)(A) (1982).

⁷⁹ See 2A SUTHERLAND, *supra* note 49, § 47.11, at 144.

ment or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regulations.”⁸⁰ Furthermore, in describing the security interest exception, the Report states: “[A] financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an ‘owner’ as long as it did not participate in the management or operation of the vessel or facility.”⁸¹ Therefore, the measure of the security interest exception is the lender’s purpose for taking indicia of ownership as security for the loan, rather than the lender’s reasons for subsequently acquiring the land.

Finally, the lender/owner’s argument that it acquired the encumbered property primarily to protect its security interest is inconsistent with the general concepts traditionally and currently employed in real estate finance law. When a mortgagee acquires the encumbered property, it does not do so to protect its security interest. That interest is protected by recording it in the public property records in accordance with the terms of the state’s recording act. Instead, the lender acquires the property to recover the outstanding loan amount. If the lender acquired the property by a voluntary conveyance, usually by a deed in lieu of foreclosure, the lender has agreed to accept the land in full or partial satisfaction of the debt. The lender’s ownership of the land has no preservative effect on the security interest. On the contrary, by acquiring the property title, the lender risks losing its security interest through operation of the doctrine of merger.⁸²

The lender/owner’s argument is attenuated even further if the lender acquired the property by foreclosing on a mortgage and buying at the sale, rather than by voluntary conveyance. Because a foreclosure sale extinguishes the lender’s security interest, a lender/owner simply will not possess a security interest at the time of the cleanup. The security interest exception, however, is worded in the present tense: “Such term [‘owner or operator’] does not include a person, who . . . *holds* indicia of ownership primarily to protect his security interest. . . .” Thus, to qualify for the security interest exception, that interest must

⁸⁰ COMMITTEE REPORT ON H.R. 85, PART 1, *supra* note 54, at 6181.

⁸¹ *Id.*

⁸² Burkhardt, *supra* note 66, at 331–52.

exist when the cleanup occurs.⁸³ When the lender has foreclosed, the security interest is extinguished and so is the protection of the exception. In sum, the lender's acquisition of the property protects the lender's source of payment, not its security interest.

Although the above arguments may appear to be unduly technical in light of CERCLA's drafting deficiencies, SARA's amendments corroborate the limits of the exception. SARA amended the definition of "owner or operator" to provide that if the facility is acquired by a unit of state or local government due to a "bankruptcy, foreclosure, tax delinquency, abandonment, or similar means," the term "owner or operator" means the person who owned, operated, or otherwise controlled the facility immediately before the foreclosure.⁸⁴ Congress did not provide a similar exception for lender/owners, although the business journals had highlighted this issue before SARA's enactment.⁸⁵

Final confirmation that a lender/owner is not included within the security interest exception is supplied by use of the term "owner or operator" throughout the Act in contexts that would cause such a limitation of liability to violate CERCLA's statutory goals. A determination that a lender/owner is protected from section 107⁸⁶ liability because of the security interest exception would also exempt the lender/owner from all other CERCLA provisions that otherwise apply to an owner or operator and that should apply to a lender/owner. For example, subsection 104(e) provides that a government agent who takes samples of hazardous substances from a property must "give to the owner, operator, or person in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained."⁸⁷ Certainly, a lender/owner, no less than any other variety of owner, should have the advantage of this statutory right to a receipt and to a portion of any sample taken. Similarly, subsection 111(g) requires an owner or operator to provide notice to potential injured parties of a hazardous substance that has been released

⁸³ *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986).

⁸⁴ 42 U.S.C.A. § 9601(20)(A)(iii) (West Supp. 1987).

⁸⁵ *See, e.g., Angelo & Bergeson, supra* note 11, at 111-12; Burcat, *supra* note 13, at 513-15.

⁸⁶ 42 U.S.C. § 9607 (1982 & Supp. II 1984).

⁸⁷ 42 U.S.C. § 9604(e)(1)(B) (1982).

from the vessel or facility.⁸⁸ Imposition of this responsibility on a lender/owner is necessary because, as the person in possession of the vessel or facility, the lender/owner is in the best position to discover such discharges, to analyze them, and to notify potentially affected parties. If a lender/owner were excepted from this requirement by virtue of the security interest exception, the notice requirement of subsection 111(g) would be nullified because it does not impose this duty on any other person. For public safety reasons, the lender/owner must be subject to this statutory responsibility. The lender/owner, therefore, must be excluded from the security interest exception to preserve the Act's balance.

The security interest exception was the primary focus of both reported decisions involving a response cost recovery action against a lender/owner.⁸⁹ Predictably, the lender/owner in each case argued that it was not liable because of the security interest exception. One federal district court agreed with the defendant's argument,⁹⁰ and the other federal district court indicated that on a different set of facts it also would hold that the security interest exception insulates a lender/owner from liability.⁹¹

In the first of these cases decided, *United States v. Mirabile*, American Bank and Trust Company (ABT) had financed a paint manufacturing business. The loan was secured, in part, by a mortgage on the manufacturing site. When the loan went into default, ABT foreclosed and was the highest bidder at the sheriff's sale. Rather than accept a sheriff's deed to the property, however, ABT searched for a purchaser for its interest and, four months after the sale, assigned its interest in the site to the Mirabiles.⁹²

⁸⁸ *Id.* § 9611(g).

⁸⁹ An earlier case, *In re T.P. Long Chem., Inc.*, 45 Bankr. 278 (N.D. Ohio 1985) has been described as stating in dictum that a lender is not an owner subject to CERCLA liability if it acquires the property in which it has a security interest. *See, e.g., Fear of Foreclosure: United States v. Maryland Bank & Trust Co.*, 16 Env'tl. L. Rep. (Env'tl. L. Inst.) No. 7, at 10,165, 10,165 n.5 (July 1986). *In re T.P. Long*, however, does not support that proposition. Instead, the court stated in dictum that if the holder of a security interest in personal property repossessed the property for sale pursuant to its security agreement without acquiring title, the security interest holder would not be an owner as defined by CERCLA. This dictum is a correct interpretation of CERCLA. If the lender does not acquire title to the contaminated property, whether real or personal, it is not an owner.

⁹⁰ *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985).

⁹¹ *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

⁹² *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

Approximately fourteen months after the Mirabiles acquired the property, an EPA agent inspected it and discovered some 550 drums of waste from the paint manufacturing operation, many of which were in a deteriorated condition. When the Mirabiles failed to respond to an EPA cleanup notice, EPA cleaned the site. EPA then sued the Mirabiles to recover its response costs, and the Mirabiles joined ABT and others as third-party defendants. ABT moved for summary judgment on the grounds that: (1) it was never an owner because it acquired only equitable title to the property at the foreclosure sale and never acquired legal title by accepting a sheriff's deed; and (2) it foreclosed and took steps to secure the property after the foreclosure sale solely to protect its security interest.⁹³

ABT's argument that it was never an owner of the property within the meaning of section 107⁹⁴ was weak. ABT conceded that it had acquired equitable title to the property, pursuant to which it took possession of the property. Moreover, no other person could properly be denominated the owner of the property. Under the relevant state foreclosure law, neither the former owner nor any junior lienor retained a right to redeem the property title after the sale.⁹⁵ Furthermore, state law required the sheriff who conducted the foreclosure sale to perfect title in the foreclosure sale purchaser by issuing a deed within ten days after the sale.⁹⁶ ABT successfully delayed issuance of the deed by advising the sheriff and the local tax department that "it intended to take title to the property."⁹⁷ Considering ABT's knowledge of the waste on the property and of the cost of disposing of it,⁹⁸ ABT may have been attempting to avoid CERCLA liability by avoiding legal title to the property.

Although the court recognized that the property title ABT acquired at the foreclosure sale could be sufficient to bring it within the scope of CERCLA's liability provisions, the court determined that the original security interest controlled regardless of the subsequent acquisition of title:

⁹³ *Id.*

⁹⁴ 42 U.S.C. § 9607 (1982).

⁹⁵ See *In re Rouse*, 48 Bankr. 236, 239 (E.D. Pa. 1985) ("... [A]ccording to Pennsylvania law, the debtor's right to redeem the mortgage terminated when the sheriff's sale took place."); G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 8.4, at 616 n.1 (2d ed. 1985).

⁹⁶ 42 PA. CONS. STAT. ANN. § 3135 (Purdon 1987). The only statutory exception is if a "petition has been filed to set aside the sale."

⁹⁷ *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

⁹⁸ *Id.*

I need not resolve the issue of whether, under Pennsylvania law, ABT's successful bid at the sheriff's sale technically vested ABT with ownership as defined by the statute. Regardless of the nature of the title received by ABT, its actions with respect to the foreclosure were plainly undertaken in an effort to protect its security interest in the property. ABT made no effort to continue [the paint manufacturing] operations on the property, and indeed foreclosed some eight months after all operations had ceased.

. . . [I]n enacting CERCLA Congress manifested its intent to impose liability upon those who were responsible for and profited from improper disposal practices. Thus, it would appear that before a secured creditor such as ABT may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site. In the instant case, ABT merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation.⁹⁹

In effect, the court's reasoning eliminates the statutory imposition of liability on the person who owns the property when the cleanup occurs. The court's reasoning is flawed in three ways. First, under the statutory scheme, the current owner is liable not because it is "responsible for and profited from improper disposal practices," but because it benefits from the cleanup through the increase in the property's value.¹⁰⁰ Second, nothing in the legislative history justifies a conclusion that Congress intended to treat lender/owners differently than other innocent purchasers. In fact, a lender such as ABT that provided financing for the waste generating activity is a less sympathetic defendant than a purchaser who did not contribute in any way to the operation and, indeed, may have acquired the land without knowledge of the hazardous wastes on the property. Finally, as developed below,¹⁰¹ a landowner has a common law responsibility to correct hazardous conditions on its property regardless of whether it caused or contributed to the hazard. The security interest exception to liability properly does not protect lender/owners.

Ironically, the court in *Mirabile* had an obvious and incontrovertible ground for granting ABT's motion for summary judgment: ABT did not own the site during the EPA cleanup. ABT

⁹⁹ *Id.*

¹⁰⁰ See *supra* note 26.

¹⁰¹ See *infra* notes 190-237 and accompanying text.

assigned its property interest to the Mirabiles on December 15, 1981, and an EPA official first visited the property in February 1983.¹⁰² No court or commentator has previously identified this particular flaw in the court's reasoning. In fact, *United States v. Maryland Bank & Trust Company*¹⁰³ indicates that the seed planted by the *Mirabile* court may mature into a noxious weed.

In *Maryland Bank & Trust*, Maryland Bank & Trust (MB&T) lent money to the owner and operator of a trash and garbage dump site. The borrower ran the business on property owned jointly with his spouse. According to the district court's factual summary, MB&T knew the nature of the borrower's business; but the record does not reveal whether MB&T obtained this information before or after making the loan.¹⁰⁴ When the owners sold the property to their son, MB&T made him a \$335,000 purchase money loan. The son defaulted on the loan, and MB&T foreclosed on the property and purchased it at the sale. Eleven months later, the son reported the existence of hazardous wastes on the site to the county health department, which then notified EPA. Some seventeen months after MB&T had acquired the property for \$381,500, EPA cleaned it at a cost of approximately \$551,713.50 and demanded payment from MB&T. When MB&T failed to pay, EPA brought suit.¹⁰⁵

Among other defenses, MB&T argued that it was not liable pursuant to the security interest exception. The court rejected this defense for three reasons. First, the court recognized that the foreclosure sale extinguished MB&T's security interest and that, therefore, MB&T did not possess "indicia of ownership primarily to protect [its] security interest" when the EPA cleanup occurred.¹⁰⁶ Second, the court cited legislative history to demonstrate that Congress created the security interest exception for the limited purpose of insuring that similarly situated lenders are treated equally regardless of differing state law rules

¹⁰² *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,993. Although EPA did not inspect the property until 1983, the Pennsylvania Department of Environmental Resources informed Mr. Mirabile "in the winter of 1981-1982" that drums on the property contained hazardous waste and requested that he remove them. Nothing in the opinion indicates, however, that EPA or the state agency ever contacted ABT about the property, either before or after ABT assigned its interest in the land to the Mirabiles.

¹⁰³ 632 F. Supp. 573 (D. Md. 1986).

¹⁰⁴ *Id.* at 575.

¹⁰⁵ *Id.* at 575-76.

¹⁰⁶ *Id.* at 579.

of mortgage and title.¹⁰⁷ Finally, the court recognized that MB&T would be unjustly enriched if it were not held liable for EPA's response costs:

Under the scenario put forward by the bank, the federal government alone would shoulder the cost of cleaning up the site, while the former mortgagee-turned-owner, would benefit from the clean-up by the increased value of the now unpolluted land. At the foreclosure sale, the mortgagee could acquire the property cheaply. All other prospective purchasers would be faced with potential CERCLA liability, and would shy away from the sale. Yet once the property has been cleared at the taxpayers' expense and becomes marketable, the mortgagee-turned-owner would be in a position to sell the site at a profit.

In essence, [MB&T's] position would convert CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties.¹⁰⁸

Unfortunately, the court did not stop its analysis there but continued by discussing *Mirabile*. Despite the *Maryland Bank & Trust* court's strong statements of the policy reasons for holding lender/owners liable under CERCLA, the court indicated that it would not hold a lender/owner liable if it had owned the contaminated property for only a few months before the cleanup. Like the *Mirabile* court, the *Maryland Bank & Trust* court failed to recognize that the lender in *Mirabile* was not liable for response costs simply because it was not the owner during the cleanup. Instead, the court characterized the *Mirabile* holding as turning on the lender/owner's sale of the property four months after the foreclosure sale:

The [*Mirabile*] court found that the mortgagee's purchase of the land at the foreclosure was plainly undertaken in an effort to protect its security interest in the property. That holding pertained to a situation in which the mortgagee-turned-owner promptly assigned the property. *To the extent to which that opinion suggests a rule of broader application, this Court respectfully disagrees.*¹⁰⁹

This statement implies that the *Maryland Bank & Trust* court agreed with the *Mirabile* holding on its facts. The conclusion is

¹⁰⁷ *Id.* at 580.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (emphasis added).

reinforced by the court's further statement: "The [security interest] exclusion does not apply to former mortgagees currently holding title after purchasing the property at a foreclosure sale, *at least when, as here, the former mortgagee has held title for nearly four years, and a full year before the EPA cleanup.*"¹¹⁰ Again, this statement implies that the court might hold that the security interest exception protects a lender if it purchased the property less than a year before the EPA cleanup.

The *Maryland Bank & Trust* court, however, expressly reserved the issue of whether a lender can qualify for the security interest exception after acquisition of contaminated property.¹¹¹ Its discussion in dictum of the CERCLA liability of a lender/owner that owns for less than a year, however, is troubling. Although the court clearly recognized the reasons for denying lender/owners the protection of the security interest exception, it indicated that it would follow the *Mirabile* court's lead when deciding a case in which the lender/owner held title for several months. Such a decision would interfere with CERCLA's legislative scheme by creating a class of landowners who could avoid liability for response costs and other obligations CERCLA imposes on landowners for the public safety.

Regardless of how long a lender/owner owns land before a hazardous waste cleanup, the lender does not qualify for the security interest exception in subsection 101(20)(A).¹¹² Once the lender acquires the land, it no longer holds mere indicia of ownership. Furthermore, a lender's argument that it acquired the property primarily to protect its security interest is unavailing. That statutory phrase refers not to the lender's acquisition of the land but to its reasons for accepting a mortgage. Thus, the security interest exception serves the very limited purpose of ensuring that CERCLA treats secured lenders equally despite differences in state law mortgage characterizations.¹¹³ Although the security interest exception provides no relief to a lender/owner, the third-party defense of subsection 107(b)(3)¹¹⁴ offers a safe harbor, albeit a narrow one.

¹¹⁰ *Id.* at 579 (emphasis added).

¹¹¹ *Id.* at 579 n.5.

¹¹² 42 U.S.C. § 9601(20)(A)(iii) (1982).

¹¹³ See *supra* notes 66-69 and accompanying text.

¹¹⁴ 42 U.S.C. § 9607(b)(3) (1982).

C. Subsection 107(b)(3): Third-Party Defense

Although a lender/owner is potentially liable for response costs as an owner under subsection 107(a)(1), it still may avoid liability even if the cleanup occurs during its ownership. Congress provided three affirmative defenses to liability. Subsection 107(b)(1)–(3) provides that an otherwise responsible party will avoid liability if it can prove that the hazardous waste release or threat of release and the resulting damages were caused solely by (1) an act of God, (2) an act of war, or (3) an act or omission of a third party.¹¹⁵ Not surprisingly, litigation concerning the subsection 107(b) defenses has centered on the third-party defense.

Originally, to establish the third-party defense, an owner had to prove only three facts. First, the owner had to establish that the third party's actions were the sole cause of the hazardous condition.¹¹⁶ The CERCLA legislative scheme requires that anyone that contributed to a hazardous waste problem share in the cost of correcting it. Second, the owner had to establish that it exercised due care with respect to the hazardous substances on its land.¹¹⁷ Apparently, Congress did not intend to relieve an owner qualifying for the third-party defense of any duty to exercise due care with respect to the hazardous waste.¹¹⁸ Third, the owner had to establish that the third party was not the

¹¹⁵ Subsection 9607(b) provides:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

Id. § 9607(b) (1982 & Supp. II 1984).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ INTERSTATE AND FOREIGN COMMERCE COMMITTEE, H.R. REP. 1016, PART 1, 96th Cong., 2d. Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS, 6119, 6137.

owner's employee, agent, or "one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the [owner] (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail). . . ." ¹¹⁹ By providing, in effect, an exception to the exception, Congress prevented an owner from escaping CERCLA liability by the simple expedient of contracting with a third party.

Before SARA, CERCLA did not include a definition of the type of contractual relationship that would defeat the third-party defense. According to authorities on statutory construction, the proper construction of the term in this context is that an owner cannot avoid liability if the third party was an independent contractor, just as the owner cannot avoid liability if the third party was the owner's agent or employee. ¹²⁰ This interpretation of the contractual relationship provision is supported by the parenthetical provision following it concerning common carrier contracts. The term "contractual relationship" also properly applies to lease agreements. A landlord cannot avoid liability for its tenant's dumping activities based on the third-party defense. ¹²¹ Interpreting the term "contractual relationship" to apply to agreements with independent contractors or with tenants is consistent with the common-law concept of a landowner's nondelegable duties. ¹²²

Although CERCLA originally did not include a definition of contractual relationship for the third-party defense, SARA provides a definition of that term in a lengthy new definitional subsection 101(35). ¹²³ Consistent with Congress' determination to spread response costs over the widest possible base and to encourage property owners to clean their waste sites, SARA's contractual relationship definition restricts the availability of the

¹¹⁹ 42 U.S.C. § 9607(b)(3) (1982).

¹²⁰ See, e.g., 2A SUTHERLAND, *supra* note 49, § 47.17, at 166 (defining *ejusdem generis*: "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words.").

¹²¹ *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1048-49 (2d Cir. 1985) (lessor of a warehouse where lessee is releasing hazardous waste is a potentially liable party under CERCLA); *United States v. Argent Corp.*, 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,616, 20,616 (D.N.M. 1984) (defendant may not assert the third-party affirmative defense in connection with activities done by tenants of its property).

¹²² RESTATEMENT (SECOND) OF TORTS § 416 (1979); W.L. PROSSER & W.P. KEETON, TORTS § 71, at 511-15 (5th ed. 1984).

¹²³ 42 U.S.C.A. § 9601(35) (West Supp. 1987).

third-party defense to the most innocent owners and creates new incentives for private cleanups. Before amendment, CERCLA did not impose liability on an innocent owner who acquired the contaminated property after dumping stopped and who sold the property before the cleanup. New subsection 101(35) virtually has eliminated that safe harbor for an innocent lender/owner by providing circumstances under which a former property owner is liable for response costs if it had actual or constructive knowledge of the hazardous condition—even if it did not contribute to the contamination by action or by inaction.

Subsection 101(35)(A) defines a contractual relationship to include “land contracts, deeds or other instruments transferring title or possession.”¹²⁴ The third-party defense therefore now applies only if the release or threatened release and resulting damage are caused solely by “an act or omission of a third party other than . . . one whose act or omission occurs in connection with [land contracts, deeds or other instruments transferring title or possession or other types of contractual relationships], existing directly or indirectly, with the defendant.”¹²⁵ Although awkwardly connected to the language of the third-party defense, subsection 101(35)(A) confirms the judicial holdings that a waste site owner cannot avoid liability by leasing the property or otherwise transferring possession to a third party.¹²⁶

Subsection 101(35)(A) takes a significant step beyond this accepted principle, however, by providing that a transfer of title, rather than of the mere right to possess, can defeat the third-party defense.¹²⁷ Again, the reference in subsection 101(35)(A) to a deed is awkwardly connected. Rarely, if ever, will a third party’s dumping activities “occur . . . in connection with” a deed or other instrument transferring title. Subsections 101(35)(A)(i), 101(35)(B), and 101(35)(C), however, illustrate the meaning of this reference to title conveyances by imposing two significant new conditions to the third-party defense.

New subsections 101(35)(A)(i) and 101(35)(B) limit the third-party defense by imposing substantial requirements on a defendant when it acquires the property.¹²⁸ These subsections provide that a defendant qualifies for the third-party defense only if it

¹²⁴ *Id.* § 9601 (35)(A).

¹²⁵ 42 U.S.C. § 9607(b)(3) (1982); 42 U.S.C.A. § 9601(35)(A) (West Supp. 1987).

¹²⁶ See *supra* cases cited in notes 56–57.

¹²⁷ 42 U.S.C.A. § 9601(35)(A) (West Supp. 1987).

¹²⁸ *Id.* § 9601(35)(A)(i), (B).

can establish that, before it acquired the property, it conducted "all appropriate inquiry"¹²⁹ and "did not know and had no reason to know"¹³⁰ of the existence on the site of the leaking hazardous substances. Ironically, responsible business practices will usually preclude a lender/owner from proving that it satisfied these requirements, especially in light of the factors that a court is statutorily directed to consider in determining whether a defendant is eligible for the protection of the third-party defense.¹³¹

Commercial lenders virtually always require a title examination for any property offered as collateral. Although title examination reports normally are limited to a statement of the current state of title, the title examiner preparing the report generally examines the prior links in the chain of title. Therefore, information about prior owners and users would be available to the lender, enabling it to assess the likelihood that the property had been used in the past as a waste site or for a hazardous waste generating business, such as paint production. Furthermore, lenders extending loans to commercial borrowers often investigate the borrower's business operations in order to tailor the loan agreement to the borrower's particular need. Thus, the lender would have notice of the nature of the borrower's business, including the potential for storing or disposing hazardous waste on the property. Lenders also commonly employ inspectors to examine the property, particularly in connection with construction loans. The inspector should discover any visible signs of hazardous waste on the property. Finally, lenders often require a borrower to execute an affidavit at the loan closing certifying facts concerning the condition of the property and its title. Thus, of all potential property purchasers, a lender is among the most able to discover the potential for hazardous waste contamination.¹³²

The third-party defense, however, will not necessarily protect a lender/owner even if it did not discover the existence of hazardous wastes in the course of normal pre-loan investigations.

¹²⁹ *Id.* § 9601(35)(B).

¹³⁰ *Id.* § 9601(35)(A)(i).

¹³¹ Subsection 101(35)(B) directs the court to consider: (1) the defendant's specialized knowledge or experience; (2) the relationship of the purchase price the defendant paid to the value of the property if uncontaminated; (3) any commonly known or reasonably ascertainable information about the property; (4) the obviousness of the presence or likely presence of contamination at the property; and (5) the ability to detect such contamination by appropriate inspection. *Id.* § 9601(35)(B).

¹³² See generally M.R. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* (4th ed. 1984).

Despite lenders' arguments to the contrary, EPA has taken the position that a lender/owner will not satisfy the inquiry duty of subsection 101(35)(B) merely by investigating the property before making the loan. The lender/owner will qualify for the third-party defense only if it did not have actual or constructive notice when it acquired the property.¹³³ This position is firmly grounded in the statutory language.¹³⁴

Moreover, subsection 101(35)(B) provides that a court determining whether a defendant qualifies for the third-party defense must consider whether the contamination could have been discovered by "appropriate inspection." This standard apparently requires an investigation that is more focused on determining the existence of hazardous waste on the site than a lender's normal loan investigation. The most "appropriate inspection" for determining the existence of hazardous waste contamination is by specifically testing the property for such contamination. Predictably, as a direct result of CERCLA and now of SARA, the number of private environmental inspectors is rapidly increasing. Additionally, lenders' attorneys are advising their clients to include such inspections as part of their routine loan processing and pre-foreclosure procedures.¹³⁵

The lender's usual method of acquiring the property, foreclosure, enhances the risk that it will not qualify for the third-party defense. Subsection 101(35)(C) directs a court ruling on the availability of the third-party defense to examine the purchase price paid in relation to the property's value if uncontaminated. If the purchaser paid significantly less than the uncontaminated property value, the apparent presumption is that it had actual knowledge of the contamination or should have been alerted to the fact that something was amiss. Foreclosing lenders may run afoul of this provision because foreclosure sale prices often are substantially lower than the property's fair market value. Although that fact reduces the probative value of the price paid as an indicator of the purchasing lender's actual or constructive

¹³³ Leifer Paper, *supra* note 26, at 4.

¹³⁴ Subsection 101(35)(B) provides:

To establish that the defendant had no reason to know, as provided in [subsection 101(35)(A)(i)], the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.

42 U.S.C.A. § 9601(35)(B) (West Supp. 1987).

¹³⁵ See, e.g., Angelo & Bergeson, *supra* note 11, at 101; Richman & Stukane, *supra* note 13, at 13; Shea, *supra* note 13, at 11.

knowledge of the property contamination, a court may not be inclined to rule in favor of the lender on this basis because of Congress' express intent to assess response costs against those economically benefited by the cleanup.

Perhaps the most serious obstacle for a lender/owner to surmount, however, in its attempt to claim the protection of the third-party defense is the subsection 101(35)(B) provision that the court, in determining whether the lender had reason to know of the contamination, consider whether the defendant has "any specialized knowledge or experience."¹³⁶ The court's analysis in *Maryland Bank and Trust*¹³⁷ does not bode well for lender/owners in this regard, as the court strongly indicated that it would hold a lender/owner to a high standard in determining whether the lender/owner had sufficient reason to know of the contamination to prevent it from asserting the third-party defense. In discussing the policy reasons for imposing liability on lender/owners, the court stated: "Mortgagees . . . have the means to protect themselves, by making prudent loans. Financial institutions are in a position to investigate and discover potential problems in their secured properties. For many lending institutions, such research is routine. CERCLA will not absolve them from responsibility for their mistakes of judgment."¹³⁸ As might be expected, EPA has echoed this view. An EPA official has indicated that EPA will hold commercial lenders to a higher standard of knowledge than many other types of property owners.¹³⁹ Therefore, for a lender to retain the protection of the third-party defense, it must document first that before acquiring the property it performed a thorough search of the property title and of the land's physical condition and second that its investigation did not reveal any evidence of hazardous waste on the site.

Even if the lender/owner can establish that it was an innocent purchaser of the property under SARA, it will qualify for the third-party defense only if it can prove that it also was an innocent seller under new subsection 101(35)(C).¹⁴⁰ That sub-

¹³⁶ 42 U.S.C.A. § 9601(35)(B) (West Supp. 1987).

¹³⁷ 632 F. Supp. 573 (D. Md. 1986).

¹³⁸ *Id.* at 580 (footnotes omitted).

¹³⁹ Leifer Paper, *supra* note 26, at 5-6.

¹⁴⁰ 42 U.S.C.A. § 9601(35)(C) (West Supp. 1987). Of course, this statutory requirement does not apply if the lender has not sold the land. Regardless of whether the lender has sold the land, the lender will lose the third-party defense if it "caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action. . . ." *Id.* § 9601(35)(D).

section provides the second way in which SARA's contractual relationship definitional section restricts availability of the third-party defense. Subsection 101(35)(C) provides that a former property owner is liable for response costs, even if it did not contribute to the contamination by action or inaction, if it obtained actual knowledge of the hazardous waste contamination during ownership but did not inform the property buyer of that fact. This new provision creates an incentive that did not previously exist for an innocent property purchaser who discovers hazardous waste contamination to clean the property, rather than to attempt to avoid CERCLA liability by selling the property before an EPA cleanup.

Under new subsection 101(35)(C), when an owner discovers the hazardous condition, it has three options. It can (1) clean the site, (2) sell the property and disclose the condition, or (3) sell the property without disclosing the condition. If it sells and discloses, subsection 101(35)(A)(i) would prevent the purchaser from using the third-party defense even if a cleanup does not occur during its ownership. Few, if any, purchasers would be willing to buy under these circumstances. On the other hand, if the owner sells without disclosing the existence of the hazardous waste, it is liable for response costs under new subsection 101(35)(C)¹⁴¹ whenever the cleanup occurs. Therefore, aside from fraudulent concealment, the only way to make the property marketable again and to avoid CERCLA liability is to clean the site. EPA and the public obviously benefit from this result because the property will be cleaned sooner than if EPA performed the cleanup, and the cleanup will not require Superfund financing or a response cost recovery action. From the lender's perspective, this new subsection 101(35)(C) creates an additional incentive for scrupulous examination of a parcel of land before accepting it as collateral for a loan and before acquiring title to it.

The third-party defense provides a lender/owner's only realistic escape hatch from CERCLA liability under a proper interpretation of the Act. Before SARA, a lender/owner who did not operate the site and exercised due care with respect to existing hazardous wastes on the property would not be liable for response costs even if the cleanup occurred during its owner-

¹⁴¹ 42 U.S.C.A. § 9601(35)(C) (West Supp. 1987).

ship.¹⁴² SARA has virtually eliminated this safe harbor for lenders, however, and further creates a circumstance under which a lender will be liable for response costs although the cleanup occurred after it sold the contaminated property. Under the current state of the law, even the most innocent lender/owners will have an uphill battle qualifying for the third-party defense because of their recognized expertise in evaluating property.¹⁴³ As a last resort, therefore, a lender might argue that this liability scheme is unconstitutional.

D. Constitutionality

Defendants in CERCLA response cost recovery actions have challenged the Act on several constitutional grounds, including arguments based on an alleged violation of substantive due process,¹⁴⁴ the taking clause,¹⁴⁵ and the contract clause.¹⁴⁶ To date, no court has ruled on the constitutionality of CERCLA as applied to a lender. Accordingly, this section of the Article will focus on the constitutional defenses that a lender might assert in a CERCLA action. CERCLA affects a lender's rights and liabilities both when it owns only the mortgage and if and when it subsequently acquires the encumbered land. Therefore, analysis of CERCLA's constitutionality as it affects lenders must focus both on a lender's mortgage ownership and on its land

¹⁴² See *Cadillac Fairview/California Inc. v. Dow Chem. Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,376, 20,378 (C.D. Cal. 1984).

¹⁴³ One commentator has argued that Congress enacted the contractual relationship definition as part of SARA "to make clear that innocent purchasers of land may rely on the 'third-party' defense despite the fact that they engaged in a land transaction with the previous owner who caused a release." Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 *ECOLOGY L.Q.* 365, 378 (1987). As discussed above, the new "contractual relationship" definition has a very different effect.

¹⁴⁴ See, e.g., *NEPACCO*, 810 F.2d 726, 732-34 (8th Cir. 1986); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 218-21 (D. Mo. 1985).

¹⁴⁵ See, e.g., *NEPACCO*, 810 F.2d at 734; *Conservation Chem.*, 619 F. Supp. at 215-17.

¹⁴⁶ See, e.g., *Conservation Chem.*, 619 F. Supp. at 214; *United States v. Stringfellow*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,388, 20,389 (C.D. Cal. 1984). At least one CERCLA defendant also has challenged CERCLA as violating the ex post facto clause and the equal protection clause. *Conservation Chem. Co.*, 619 F. Supp. at 214. The court rejected both challenges. The ex post facto clause, applies only to criminal laws that inflict punishment. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 n.13 (1977). The equal protection challenge also cannot be sustained under the rational relationship test. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 14.3, at 530 (3d ed. 1986).

ownership. Such analysis reveals that the Act is constitutional as applied to lenders in both situations.

1. Substantive Due Process Challenges

An innocent lender/owner plausibly can defend a CERCLA recovery action on two substantive due process grounds. First, the lender/owner may argue that imposition of CERCLA liability on a person who did not create or contribute to the problem for which damages are assessed violates substantive due process. Second, it may assert that CERCLA constitutes unconstitutionally retroactive legislation. Although retroactive legislation is not expressly prohibited by a constitutional provision, the Supreme Court has held that retroactive legislation may violate substantive due process.¹⁴⁷ In light of the low level of scrutiny afforded economic and social welfare legislation,¹⁴⁸ both arguments should be dismissed.

The first argument, that CERCLA's liability scheme is unconstitutional as applied to innocent owners, merits only passing reference. Few would deny that leaking hazardous waste sites pose a grave danger to people and to the environment and that sound policy demands that these sites be cleaned. The pertinent question becomes "who should bear the economic burden of the clean-up?"

Imposing response costs on the person who controls the property and is directly benefited by the cleanup is reasonable and is consistent with a landowner's common law liability.¹⁴⁹ Unless a property owner acts to prevent hazardous waste releases from its land, it is contributing to the releases, albeit by inaction. By failing to act, thereby necessitating EPA intervention, the lender is not an innocent owner.¹⁵⁰ Moreover, Congress exempted the

¹⁴⁷ See, e.g., *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

¹⁴⁸ See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 146, § 11.4, at 356.

¹⁴⁹ See *infra* text accompanying notes 190-238.

¹⁵⁰ This was the basis for the court's holding in *United States v. Price*, 523 F. Supp. 1055, 1073 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1983). In that case, the court held that defendants, who acquired a parcel of property several years after dumping on the property had stopped, were liable under the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 (1982), even though they had not dumped or permitted others to dump wastes on the property. The reported opinion does not indicate that the court or the parties considered the constitutionality of this imposition of liability. Compare *Department of Env'tl. Protection v. Exxon Corp.*, 151 N.J. Super. 464, 376 A.2d 1339 (N.J. Super. Ct. Ch. Div. 1977), in which the New Jersey Superior Court construed the following definition of "discharge" in a state statute to require an act by the landowner:

least blameworthy landowners by means of the third-party defense. Thus, the courts should reject the argument that imposition of liability on a lender/owner is a *prima facie* violation of substantive due process.

The lender/owner's second due process argument, that CERCLA is unconstitutional retroactive legislation, is also flawed. The Act does operate retroactively in the sense that it may impose liability for actions taken before the Act's effective date. CERCLA defendants may claim that they are being held liable for conduct that they did not know would be actionable or harmful at the time it was taken. If the waste generators and transporters and the waste site owners acting before CERCLA's effective date had known that they would be liable in the future for response costs, they might have conducted their waste activities in a manner designed to reduce or to avoid liability.¹⁵¹ Similarly, if a lender had known that it could be liable for response costs if it acquired the waste site upon default in a loan, it might have refused to lend against the security of that land and might not have acquired the land to recover its loan.

One response to these arguments that avoids the constitutional issue is that CERCLA does not impose liability for acts committed before its effective date. Rather, CERCLA imposes liability for the land's current condition and the damage it is causing or threatening to cause. Supreme Court precedent supports this view: "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment."¹⁵² Although some courts have interpreted CERCLA and similar environmental acts in this manner,¹⁵³ this

"'Discharge' shall mean, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping." 151 N.J. Super. at 471, 376 A.2d at 1343. The court's decision was based on rules of statutory construction, however, and not on a determination that the act would be unconstitutional if applied to an innocent landowner. 151 N.J. Super. at 471, 376 A.2d at 1343-44.

¹⁵¹ See, e.g., *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072 (D. Colo. 1985); Reply Memorandum of "Generator" Defendants and Amicus Curiae in Support of Motion for Summary Judgment on Constitutional Grounds at 21, *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

¹⁵² *Reynolds v. United States*, 292 U.S. 443, 449 (1934).

¹⁵³ See, e.g., *United States v. Miami Drum Services Inc.*, 25 Env't Rep. Cas. (BNA) 1469, 1477 (S.D. Fla. 1986); *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. at 984. See also *Price*, 523 F. Supp. at 1071-72, in which the court discussed a retroactivity challenge to the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 (1982):

Defendants . . . observe that Section 7003 was not adopted and did not become effective until 1976, and they argue that the statute was not meant to apply

interpretation does not respond to the substance of the retroactivity argument—that the defendant's actions were legal when taken and that the defendant may have been unaware at the time of the harmful effects that could result from its conduct. Despite the argument's superficial appeal, it is inconsistent with the Supreme Court's interpretation of the scope of protection the due process clause provides against retroactive legislation.

Two relatively recent Supreme Court cases, *Usery v. Turner Elkhorn Mining Company*¹⁵⁴ and *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*,¹⁵⁵ demonstrate that even if CERCLA is construed as applying retroactively, it is not unconstitutional for that reason. In *Usery*, the Supreme Court considered a substantive due process challenge that parallels the challenge to CERCLA's retroactive aspects. The Federal Coal Mine Health and Safety Act of 1969,¹⁵⁶ as amended by the Black Lung Benefits Act of 1972,¹⁵⁷ requires coal mine operators to compensate, among others, any former employee disabled by pneumoconiosis, even if the employee had terminated his or her work in the industry before Congress enacted the 1969 Act. Like defendants challenging CERCLA's retroactive liability

retroactively to acts that preceded that date. Hence, because the dumping of toxic wastes at Price's Landfill ceased in 1972, defendants argue that the statute cannot be used to impose liability on them.

We find this argument unpersuasive. . . . The gravamen of a Section 7003 action, as we have construed it, is not defendants' dumping practices, which admittedly ceased with respect to toxic wastes in 1972, but the present imminent hazard posed by the continuing disposal (i.e., leaking) of contaminants into the groundwater. Thus, the statute neither punishes past wrongdoing nor imposes liability for past acts. Rather, as defendants themselves argue, its orientation is essentially prospective. When construed in this manner, the statute simply is not retroactive. It merely relates to current and future conditions.

Tri-County Landfill Co. v. Illinois Pollution Control Bd., 41 Ill. App. 3d 249, 353 N.E.2d 316 (1976) (application of Environmental Protection Act not retroactive because discharges from the landfill occur presently); *Freeman Coal Mining Corp. v. Illinois Pollution Control Bd.*, 21 Ill. App. 3d 157, 313 N.E.2d 616 (1974) (pollution occurs at time of discharge, not at time pollution source is created); *United States v. Diamond Shamrock Corp.*, 12 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,819 (N.D. Ohio 1981) (though defendant ceased disposal of hazardous waste four years prior to passage of Resource Conservation and Recovery Act, imposition of liability is not retroactive because the Act applies to presently existing conditions); *Philadelphia Chewing Gum Corp. v. Dep't of Env'tl. Resources*, 35 Pa. Commw. 443, 387 A.2d 142 (1978) (although appellants created condition before passage of Clean Streams Law, they could be required to clean present condition); *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A.2d 871 (1974), *appeal dismissed*, *Barnes & Tucker Co. v. Pennsylvania*, 434 U.S. 807 (1977) (imposing liability based on Clean Streams Law does not deny due process of law).

¹⁵⁴ 428 U.S. 1 (1976).

¹⁵⁵ 467 U.S. 717 (1984).

¹⁵⁶ 30 U.S.C. § 801 (1982).

¹⁵⁷ 30 U.S.C. §§ 901-962 (1982).

scheme, the coal mine operators in *Usery* argued that holding them liable for the disabilities of former employees violated the operators' due process rights because liability was predicated on completed acts that, when taken, were legal and, "at least in part," were not known to be dangerous.¹⁵⁸

The *Usery* Court unequivocally rejected this argument. Although the Court stated that the justifications supporting prospective application of legislation might be insufficient to justify its retroactive application, the Court applied a lower level of scrutiny in reviewing the retroactive aspects of the legislation. The facts that the defendants were unaware of the dangerous nature of their activities and that they acted in reliance on the current state of the law were factored into the Court's analysis but were not deemed controlling in assessing the rationality of the legislative scheme. The *Usery* Court held that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . ."¹⁵⁹ CERCLA's retroactive impact can be justified on similar grounds.

In 1984, the Court reaffirmed the *Usery* opinion in the *R.A. Gray* case. In that case, the Court considered a substantive due process challenge to the retroactive application of the Multiemployer Pension Plan Amendments Act of 1980 (Pension Plan Amendment)¹⁶⁰ to employers that had withdrawn from pension plans before the Pension Plan Amendment's enactment. In rejecting the employers' due process challenge, the Court relied heavily on *Usery*, stating that the Court in *Usery* "had little difficulty" rejecting the due process challenge.¹⁶¹ Although the Court repeated the statement from *Usery* that a legitimate legislative purpose must support retroactive application of legislation, the Court applied a lower level of scrutiny in reviewing the sufficiency of that purpose and held: "[W]e believe it was eminently rational for Congress to conclude that the purposes of the [Pension Plan Amendment] could be more fully effectuated if its withdrawal liability provisions were applied retro-

¹⁵⁸ *Usery*, 428 U.S. at 15.

¹⁵⁹ *Id.* at 18.

¹⁶⁰ 29 U.S.C. § 1461 (1982).

¹⁶¹ *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

actively."¹⁶² Thus, because the legislative purpose was enhanced by its retroactive application, the lower level of review was satisfied.

In light of the holdings in *Usery* and in *R.A. Gray*, the retroactive aspect of CERCLA does not violate substantive due process. Congress enacted CERCLA in response to the shortcomings of the Resource Conservation and Recovery Act.¹⁶³ The imposition of response costs on those who benefited by the dumping activities or by the cleanup is rational. Furthermore, the publicized dangers of hazardous waste dumping and the federal and state environmental legislation in force before CERCLA's enactment put lenders and other landowners on notice of the potential for liability based on ownership of contaminated land. By lending against the security of a waste site, the lender assumed the risk that the land would be rendered valueless by the release of hazardous pollutants. Protecting a defendant lender from liability, though it was aware of a potential danger when it made the loan, removes an important incentive for socially responsible behavior.¹⁶⁴ For these reasons, courts that have characterized CERCLA as retroactive legislation properly have held that it does not violate substantive due process.¹⁶⁵

¹⁶² *Id.* at 730.

¹⁶³ 42 U.S.C. § 6973 (1982). See Grad, *supra* note 15, at 35-36.

¹⁶⁴ *Toxic Waste Note*, *supra* note 4, at 1559.

¹⁶⁵ See, e.g., *NEPACCO*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985).

The defendants in both the *Shell Oil* and *Northeastern* cases alternatively argued that the government could not constitutionally charge them for response costs incurred before CERCLA's effective date. Although the district courts in both cases indicated that Congress constitutionally could have legislated such liability, the district courts reached opposite results on the issue of pre-CERCLA response cost liability. Based on its review of CERCLA's language and legislative history, the court in *Shell Oil* held that Congress intended to hold responsible parties liable for pre-enactment government response costs. The court summarily dismissed the defendant's argument that to do so would be unconstitutional:

Once it is accepted that Shell may be liable for its pre-CERCLA acts, it is irrelevant, from a due process perspective, whether the government commenced cleanup before or after the Act became law on December 11, 1980. There are no serious due process concerns in holding responsible parties liable for pre-CERCLA response costs.

605 F. Supp. at 1073.

The district court in *Northeastern*, on the other hand, rejected such liability, finding that CERCLA does not expressly authorize recovery of such costs. The court indicated, however, that Congress could have done so.

Although it was possible for Congress to legislate the liability of past generators and transporters for pre-CERCLA response costs, they did not and this Court does not deem it advisable to engage in judicial legislation concerning

2. Taking Clause Challenges

In addition to a substantive due process claim, CERCLA's retroactive aspect could trigger a taking claim by a lender that acquired a mortgage before CERCLA's effective date. Although the Supreme Court stated in *Penn Central Transportation Co. v. New York City*¹⁶⁶ that taking cases involve "ad hoc, factual inquiries,"¹⁶⁷ an admission it recently repeated in *Keystone Bituminous Coal Association v. De Benedictis*,¹⁶⁸ a lender has strong authority for its assertion that federal law can cause an unconstitutional taking of lien rights. In *United States v. Security Industrial Bank*,¹⁶⁹ *Armstrong v. United States*,¹⁷⁰ and *Louisville Bank v. Radford*,¹⁷¹ the Supreme Court reviewed taking challenges to laws that destroyed or substantially destroyed pre-existing liens. In *Armstrong* and in *Radford*, the Court held that an unconstitutional taking had occurred. In *Security Industrial Bank*, the Court sidestepped the issue by construing the statute to apply only prospectively because "substantial doubt" existed that retroactive application would survive the taking challenge.

Armed with this authority, a lender holding a pre-CERCLA lien on a waste site could argue that retroactive application of CERCLA is a taking of its mortgage lien. The most important right granted in a mortgage is the right to sell the property upon the borrower's default to recoup the loan amount.¹⁷² If the mort-

a statute of such importance and controversy. All doubts of retroactive application must be resolved in favor of the defendants; therefore, the defendants are not liable for pre-CERCLA response costs.

579 F. Supp. at 843. On appeal, the Eighth Circuit reversed this portion of the district court decision on the basis of the district court's reasoning in *Shell Oil*. See also *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1984) (holding that federal courts may create federal common law when necessary to protect uniquely federal interests).

¹⁶⁶ 438 U.S. 104 (1978).

¹⁶⁷ *Id.* at 124. The Court went on to say:

[T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Id.

¹⁶⁸ 107 S. Ct. 1232, 1247 (1987).

¹⁶⁹ 459 U.S. 70 (1982).

¹⁷⁰ 364 U.S. 40 (1960).

¹⁷¹ 295 U.S. 555 (1935).

¹⁷² If the lender cannot foreclose the mortgage, it is virtually valueless. The other rights the mortgage grants the lender, such as the right to ensure that property taxes and insurance premiums remain current, are of no consequence to the lender unless it

gaged land contains hazardous wastes, the lender will argue that the specter of section 107 liability effectively destroys its right to foreclose on the property by requiring the foreclosure sale purchaser to acquire CERCLA liability along with title. The purchaser potentially will be liable for response costs far in excess of the property's uncontaminated value unless the purchaser qualifies for the limited third-party defense. Because the lender is normally the only bidder at the foreclosure sale and because, as described above,¹⁷³ a lender will have difficulty qualifying for the third-party defense, a lender may argue that CERCLA effectively destroys its security.

A fundamental flaw in the lender's taking argument is that it focuses on the decrease in the value of its collateral, rather than on an allegation that CERCLA deprives it of a legally protected property interest. Although CERCLA may affect the value of the collateral, it does not affect the mortgage lien. This is not a mere technicality. The lender retains its lien until the debt is paid or the lender forecloses. It also retains the benefits of the mortgage covenants and the common law and statutory rights afforded mortgagees. For example, if the state where the land is located is a title theory or intermediate theory jurisdiction, in which a mortgage conveys title to the encumbered land to the lender, the lender can take possession of the property even before foreclosing. Additionally, the lender retains whatever rights are created by state law for the appointment of a receiver to take possession of the property. All the legal rights associated with the mortgage lien remain valid.

The continued vitality of the mortgage lien distinguishes a taking challenge to CERCLA from the successful taking challenges involved in the three major Supreme Court lien cases. In *Security Industrial Bank*, the Court reviewed a federal law that authorized complete destruction of pre-existing liens.¹⁷⁴ In *Arm-*

can foreclose. The mortgage covenants are almost all directed to maintaining the value of the collateral, which the lender is concerned with only as long as it retains the right to sell the property.

As further evidence of the importance of the right to foreclose, once a mortgage has been foreclosed, it is characterized as being *functus officio*. See, e.g., *Cross Cos., Inc. v. Citizens Mortgage Inv. Trust*, 305 Minn. 111, 232 N.W.2d 114, 117-18 (1975). Thus, even if the foreclosure sale proceeds were insufficient to pay the loan in full, so that a portion of the debt remains outstanding, the mortgage is extinguished because it has served its primary function.

¹⁷³ See *supra* text accompanying notes 115-43.

¹⁷⁴ 459 U.S. 70 (1982). This case consolidated seven bankruptcy cases, in which each bankrupt debtor used an exemption created by the Bankruptcy Reform Act of 1978 to

strong, although the plaintiffs' pre-existing liens were not technically destroyed, they were rendered totally unenforceable as a matter of law.¹⁷⁵ *Radford* involved a federal law that stripped

void a lien that had been created before that Act's effective date. 11 U.S.C. § 522(f)(2) (1982). The lienors challenged this retroactive application of § 522(f)(2) as a violation of the taking clause. The Court did not decide the constitutional issue. Instead, it relied on the rule of statutory construction that, if "fairly possible," the court should construe a statute in a manner that avoids a constitutional issue. Although the statutory language gave no indication that Congress intended the Bankruptcy Reform Act to apply only prospectively, the Court so construed it because "there is substantial doubt whether the retroactive destruction of the appellees' liens in this case comports with the Fifth Amendment." 459 U.S. at 78.

The Court distinguished a creditor's contractual right to repayment of the debt from the property right it acquires in the collateral by virtue of the lien. Although Congress is constitutionally empowered to impair contract rights retroactively in connection with bankruptcy proceedings, the Fifth Amendment is a check on Congress' power in dealing with property rights. U.S. CONST. amend. V. "[H]owever 'rational' the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." 459 U.S. at 75. Because § 522(f)(2) provided for destruction of property rights that existed when the statute became effective, the Court determined that a substantial taking issue existed.

In an interesting concurrence, Justice Blackmun, joined by Justices Marshall and Brennan, argued that the Court should reach the taking issue. Despite the Bankruptcy Reform Act's clear operation to destroy the pre-existing liens involved in that case, Justice Blackmun stated that he would hold that the Bankruptcy Reform Act did not cause a taking:

because the exemptions in question are limited as to kinds of property and as to values; because the amount loaned has little or no relationship to the value of the property; because these asserted lien interests come close to being contracts of adhesion; because repossessions by small loan companies in this kind of situation are rare; because the purpose of the statute is salutary and is to give the debtor a fresh start with a minimum for necessities; because there has been creditor abuse; because Congress merely has adjusted priorities, and has not taken for the Government's use or for public use; because the exemption provisions in question affect the remedy and not the debt; because the security interest seems to have little direct value and weight in its own right and appears useful mainly as a convenient tool with which to threaten the debtor to reaffirm the underlying obligation; because the statute is essentially economic regulation and insubstantial at that; and because there is an element of precedent favorable to the debtor in such cases as *Penn Central Transp. Co. v. New York City* and *PruneYard Shopping Center v. Robins*.

Id. at 84 (Blackmun, J., concurring) (citations omitted).

Blackmun's most persuasive argument is that a taking did not occur because the lien was an unenforceable part of an unconscionable transaction. The other factors stated in the concurrence, however, are contrary to established taking jurisprudence. For example, that the statute is "essentially economic legislation" is irrelevant in determining whether a compensable taking has occurred. *Id.* Similarly, the absence of governmental or public use is irrelevant as long as a public purpose exists. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁷⁵ 364 U.S. 40, 48 (1960). In *Armstrong*, the plaintiffs acquired mechanics' liens in property subsequently acquired by the federal government. Although the liens were still valid after the government's acquisition, they were unenforceable because of sovereign immunity. The Court held that, although the liens were still valid: "The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking'. . . ."

a mortgagee of its most important lien rights.¹⁷⁶ In contrast, CERCLA does not alter a mortgagee's lien rights. Because no property right is affected, the taking clause does not apply.

Even on its own terms, the lender's argument is fundamentally flawed. The substance of the lender's complaint is that CERCLA decreases the value of its collateral. The simple answer is that CERCLA did not destroy the property's value—the dumping activities did. Regardless of the existence of CERCLA, a leaking hazardous waste site is a liability rather than an asset. As described in Part III of this Article, a landowner has an independent common law duty to abate hazardous conditions on its property and is responsible for damages resulting from those conditions. The government is not in violation of the taking clause when it acts to abate a public nuisance.¹⁷⁷ Based on the above analysis, CERCLA does not effect a taking whether it is applied prospectively or retroactively.

¹⁷⁶ 295 U.S. 555, 601–02 (1935). In *Radford*, the Court held unconstitutional a Bankruptcy Act amendment that applied only retroactively. The amendment, enacted during the 1930s depression, permitted a bankrupt debtor under certain circumstances to eliminate a lien on its land for less than the outstanding debt amount. If the lender consented, the Bankruptcy Act permitted a borrower, upon being adjudged bankrupt, to purchase the encumbered property at its then appraised value and provided for deferred purchase payments bearing interest at the rate of one per cent per annum. If the lender did not consent to the purchase, the borrower could obtain a five year stay on all proceedings against the land and retain possession of the property in exchange for payment of annual rent. At any time during the five year period, the borrower could pay the lender the appraised value for the property and thereby eliminate the lien.

The Court held that the amendment was an unconstitutional taking because it deprived the lender of the following property rights:

1. The right to retain the lien until the indebtedness thereby secured is paid.
2. The right to realize upon the security by a judicial public sale.
3. The right to determine when such sale shall be held, subject only to the discretion of the court.
4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

Id. at 594–95.

The Court found that the only right left to the lender under the mortgage was the right to retain the lien until the borrower exercised its right to release the lien by paying the property's appraised value, which was less than the outstanding debt amount. *Id.* at 596. The Court held that, because the amendment destroyed "rights in specific property which are of substantial value," it violated the taking clause. *Id.* at 601.

¹⁷⁷ See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928). See also *Keystone Bituminous Coal Ass'n v. De Benedictis*, 107 S. Ct. 1232, 1246 n.22 (1987); R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 112 (1985); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196–1201 (1967).

3. Contractual Impairment Challenges

The lender's final constitutional challenge to CERCLA's liability scheme asserts that the Act effects an unconstitutional impairment of contractual relations. While a challenge based on the contract clause can be readily dismissed because the contract clause does not apply to federal legislation,¹⁷⁸ the federal government's right to interfere with contractual rights is restricted by the Fifth Amendment due process clause.¹⁷⁹ This protection, however, is far less substantial than that which the contract clause provides against state legislation.¹⁸⁰ As stated by the Supreme Court in *National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway Company*:¹⁸¹

When the contract is a private one, and when the impairing statute is a federal one, . . . inquiry is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and "establish that the legislature has acted in an arbitrary and irrational way."

Because CERCLA's liability scheme is closely tailored to its legislative goals,¹⁸² a lender will find it difficult, if not impossible, to establish that the scheme is either arbitrary or irrational.

Moreover, a contract impairment challenge is flawed in the same manner as a taking challenge. The basis for the lender's contract challenge is that the threat of CERCLA liability impairs its ability to enforce its loan contract. Such a challenge should fail, however, because CERCLA does not alter the terms of the loan agreement. The lender retains its right to pursue anyone personally liable for the debt. CERCLA merely allocates liability for the cost of eliminating a hazardous condition.

¹⁷⁸ The grounds for dismissal are contained in the clause's express terms: "No State shall . . . pass any . . . law impairing the obligation of contracts." U.S. CONST. art. I, § 10 (emphasis added). Because CERCLA is federal rather than state legislation, it is not subject to the prohibition of the contract clause. At least two federal district courts have rejected contract clause challenges to CERCLA by non-lenders on this ground. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 214 (D. Mo. 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,388 (C.D. Cal. 1984).

¹⁷⁹ U.S. CONST. amend. V.

¹⁸⁰ As the Supreme Court stated: "We have never held . . . that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

¹⁸¹ 470 U.S. 451, 472 (1985).

¹⁸² See *supra* text accompanying notes 5-8.

Lenders in six states, however, have a more substantial argument that CERCLA impairs their contractual rights to recover outstanding debts. California, Idaho, Montana, Nevada, New Jersey, and Utah have statutory one-action rules.¹⁸³ The one-action rule provides that, in the event of default, the lender must foreclose on the encumbered land as a prerequisite to a suit to recover the amount outstanding under the loan agreement.¹⁸⁴ The rule is designed to force lenders to attempt to recover the debt from the collateral securing it before pursuing the borrower's other assets.¹⁸⁵ Lenders in states with one-action rules might claim that CERCLA's imposition of liability on innocent property owners effectively prevents the lender from foreclosing because the foreclosing lender usually is the only bidder at the foreclosure sale. As the only bidder, the lender usually acquires title to the foreclosed property. However, no lender will wish to acquire title if the property is a hazardous waste site potentially subject to a CERCLA cleanup action. Under these circumstances, the lender is effectively prevented from suing to recover the debt.

The above argument lacks force for three reasons. First, a lender is not legally required to bid for the property at the foreclosure sale, although it normally does so. As long as the lender conducts the foreclosure according to normal procedures, the one-action rule should be satisfied even if no one purchases the property because the lender attempted to satisfy the debt from the property.¹⁸⁶ The lender then can seek a judgment for the debt against anyone who is personally liable for it.

Second, a court may excuse the lender from conducting the sale before seeking a judgment on the note. Courts in five of the six states with a one-action rule have created an exception to the rule's application for property that has become value-

¹⁸³ CAL. CIV. PROC. CODE § 726 (West Supp. 1987) (although § 726, by its terms, applies only to mortgages, courts have construed it to apply to trust deeds as well, *see, e.g.*, *Bank of California Nat'l Ass'n v. Leone*, 37 Cal. App. 3d 444, 112 Cal. Rptr. 394 (1974)); IDAHO CODE § 6-101 (1979); MONT. CODE ANN. § 71-1-222 (1986); NEV. REV. STAT. § 40.430 (1985); N.J. STAT. ANN. § 2A:50-2 to -2.3 (West 1952 & Supp. 1987); UTAH CODE ANN. § 78-37-1 (1987). Although the New Jersey one-action rule applies only to certain types of residential properties, residences surprisingly have been built on former hazardous waste dump sites.

¹⁸⁴ G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 8.2, at 598 (2d ed. 1985).

¹⁸⁵ *Id.*

¹⁸⁶ *United States v. Caprice*, 427 F. Supp. 1035, 1039 (D.N.J. 1976).

less.¹⁸⁷ This judicially created exception is designed to excuse the lender from an exercise in futility. Although no one yet has asserted this exception when pollution has destroyed the property value, the rationale for the rule will be served by extending it to this situation. Thus, a lender holding a security interest in a hazardous waste site should be able to avoid the foreclosure requirement if it can establish that the wastes have rendered the land valueless because of potential response costs.

Finally, if the property is generating income, a lender may be able to recover the debt without foreclosing and then suing those who are personally liable. Each state with a one-action rule provides lenders with the right to petition a court for appointment of a receiver.¹⁸⁸ A receiver can protect the land from

¹⁸⁷ The five states are:

- 1) California: The California one-action statute provides: "There can be but one form of action for the recovery of any debt . . . secured by mortgage. . . . In the action the court may . . . direct the sale of the property. . . ." CAL. CIV. PROC. CODE § 726(a) (West Supp. 1987) (emphasis added). Use of the word "may" indicates that the court has discretion not to require a foreclosure sale. *See also* Kaiser Indus. Corp. v. Taylor, 17 Cal. App. 3d 346, 353, 94 Cal. Rptr. 773, 776 (1971) (holding that where creditor has no security interest in debtor's real property or security becomes valueless, creditor is not required to foreclose by statute providing only one form of action, foreclosure, on debt secured by a mortgage); Comment, *Mortgages and Trust Deeds: Foreclosure Sale of a Portion of the Mortgaged Premises: Remedies Open to the Mortgagee When the Security is Valueless: Pleading the Existence of Security*, 25 CALIF. L. REV. 469, 473-77 (1937). *But see* Jeanese, Inc. v. Surety Title & Guar. Co., 176 Cal. App. 2d 449, 455, 1 Cal. Rptr. 752, 755 (1960) (holding that a purchase money lender always must foreclose even if the security has become valueless).
- 2) Idaho: *Edminster v. Van Eaton*, 57 Idaho 115, 117-19, 63 P.2d 154, 155 (1936) (holding that statutory one-action rule does not preclude mortgagee from suing in independent action on note for which security was given, where security has become valueless); *Warner v. Bookstahler*, 48 Idaho 419, 282 P. 862 (1929) (holding that foreclosure of first mortgage without redemption and issuance of sheriff's deed exhausted security as to junior mortgagee); *Berry v. Scott*, 43 Idaho 789, 255 P. 305 (1927) (holding that one action rule provides only remedy for recovery of debt and enforcement rights secured by mortgage, unless it can be shown that the security is valueless).
- 3) Montana: *Bailey v. Hansen*, 105 Mont. 552, 74 P.2d 438 (1937) (holding that one action rule does not prohibit a personal action where the security given the creditor has become valueless without any fault on his part, in which event he may secure an attachment).
- 4) Nevada: *McMillan v. United Mortgage Co.*, 82 Nev. 117, 122, 412 P.2d 604, 606 (1966) (holding that attachment statute may be utilized if security, without fault of the mortgagee or beneficiary, has become valueless).
- 5) Utah: *Lockhart Co. v. Equitable Realty, Inc.*, 657 P.2d 1333 (Utah 1983) (recognizing an exception to the one-action rule where the security interest in the property has been depleted and is valueless through no fault of the mortgagee).

¹⁸⁸ California: CAL. CIV. PROC. CODE § 564 (West Supp. 1987); Cormack & Irsfeld, *Applications of the Distinction Between Mortgages and Trust Deeds in California*, 26 CALIF. L. REV. 206, 211-18 (1938); Comment, *Comparison of California Mortgages and Trust Deeds and Land Sale Contracts*, 7 UCLA L. REV. 83, 91-94 (1960).

Idaho: IDAHO CODE § 8-601 (1979).

Montana: MONT. CODE ANN. § 27-20-102 (1986).

Nevada: NEV. REV. STAT. ANN. § 32.010 (Michie 1986); *Bowler v. Leonard*, 70 Nev.

further waste and can apply the income generated by the property to payment of property expenses, including the outstanding loan amount.¹⁸⁹ In this way, the lender may avoid the problem presented by the one-action rule and still recover the outstanding loan amount. For these reasons, the one-action rule will not provide lenders with a successful contract impairment defense.

Therefore, like the substantive due process and taking clause arguments, the lender's impairment of contract theory is unavailing. CERCLA does not eliminate or modify any of the lender's rights pursuant to the debt contract. Although CERCLA renders foreclosure and purchase a less desirable means of recouping the debt, the substantial public good achieved by CERCLA's statutory scheme militates against a finding that this scheme is arbitrary or capricious. Realistically, therefore, the only potentially successful defense that a lender can assert to avoid CERCLA liability as an owner is the narrowly defined third-party defense.

III. COMMON LAW LIABILITY

Lenders have reacted so strongly to potential CERCLA liability in part because courts rarely have held them liable for their borrowers' activities. Injured parties have attempted to recover damages from lenders for their borrowers' actions on a number of theories, including that the borrower had acted as the lender's instrumentality¹⁹⁰ or

370, 382-84, 269 P.2d 833, 839 (1954); *Electrical Prod. Corp. v. Second Judicial Dist. Ct.*, 55 Nev. 8, 11-13, 23 P.2d 501, 503 (1933).

New Jersey: *Sweeney v. Grant Silk Mfg. Co.*, 119 N.J. Eq. 321, 182 A. 484, *aff'd*, 120 N.J. Eq. 607, 187 A. 374 (1936).

Utah: *UTAH R. Civ. P.* 66 (1987).

¹⁸⁹ While beyond the scope of this Article, a judicially established receivership creates an interesting issue concerning the receiver's liability for response costs as an "operator" pursuant to 42 U.S.C. § 9607(a)(1) (1982).

¹⁹⁰ *United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 691-92 (5th Cir. 1985) (listing the factors courts consider when determining whether one entity is the instrumentality or alter ego of another); *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1105 (5th Cir. 1973) ("[I]n the cases resulting in instrumentality liability for the creditor, the facts have unmistakably shown that the subservient corporation was being used to further the purposes of the dominant corporation and that the subservient corporation in reality had no separate, independent existence of its own."); *Chicago Mill & Lumber Co. v. Boatmen's Bank*, 234 F. 41 (8th Cir. 1916) (holding that where one corporation owns or controls the entire property of another, and operates its plant and conducts its business as a department of its own business, it is responsible for the obligations of the controlled corporation); *James E. McFadden, Inc. v. Baltimore Contractors, Inc.*, 609 F. Supp. 1102 (D. Pa. 1985) (holding that total and actual control

agent,¹⁹¹ or that the borrower and lender had been joint venturers.¹⁹² The case law that has developed with respect to these theories requires a plaintiff to establish such total control of the borrower or active lender involvement that the wrongful conduct, though nominally committed by the borrower, in fact was committed by the lender.¹⁹³ In the usual loan transaction, a lender's activities will be insufficient to trigger this common law liability, even though the lender's activities may have been sufficient to trigger CERCLA liability as an operator.

A vital distinction exists, however, between a lender's liability during the life of the loan and a lender/owner's CERCLA liability. The lender/owner's CERCLA liability is not based on the loan relationship. Liability is triggered by the lender's property ownership.¹⁹⁴ Viewed in this light, the lender/owner's CERCLA liability is consistent with well established common law princi-

must be established to render a general contractor the instrumentality of the bonding corporation). *See also* Duff v. Southern Ry. Co., 496 So. 2d 760, 762-63 (Ala. 1986) (holding that the question whether employer was an instrumentality of railroad was a question of fact precluding summary judgment); Miller v. Dixon Indus., 513 A.2d 597, 604-05 (R.I. 1986) (stating that the mere fact that there exists a parent-subsidary relationship between two corporations is insufficient reason to impose liability on the parent either for the torts of the subsidiary or for a contract breached by the subsidiary); In re S.I. Acquisition, Inc., 58 Bankr. Ct. Dec. (CCR) 454 (Bankr. W.D. Tex. 1986) (holding that creditor's action against debtor's parent corporation and against principal of both corporations seeking to pierce corporate veil under alter ego theory was not property of the bankruptcy estate and was not a claim assertable by debtor or trustee). *But see* In re Mercer Trucking Co., 16 Bankr. 176 (Bankr. N.D. Tex. 1981) (holding trustees had standing to assert alter ego status of creditor vis-a-vis debtors).

¹⁹¹ A. Gay Jensen Farms, Co. v. Cargill, Inc., 309 N.W.2d 285, 292 (Minn. 1981); RESTATEMENT (SECOND) OF AGENCY § 14-o comment a (1958). *See* Save Way Oil Co. v. Mehlman, 115 A.D.2d 721, 496 N.Y.S.2d 537 (1986); B.A. Buck v. Nash-Finch Co., 78 S.D. 334, 102 N.W.2d 84 (1960).

¹⁹² Rehnberg v. Minnesota Homes, 52 N.W.2d 454, 457 (Minn. 1952) (listing the four elements that must be satisfied to find a joint venture). *See also* Atlanta Shipping Corp. v. Chemical Bank, 631 F. Supp. 335 (S.D.N.Y. 1986) (dismissing joint venturer claim on the basis that a transaction involving a loan of money and creating a debtor-creditor relationship will not of itself make lender and borrower joint venturers); Connor v. Great W. Sav. & Loan Ass'n, 73 Cal. Rptr. 369, 375, 447 P.2d 609, 615 (1968) (dismissing joint venturer claim because association between builder and contractor did not include agreement to share profits and losses either might realize or suffer); Meyers v. Postal Finance, 287 N.W.2d 614, 617-18 (Minn. 1979) (holding that assignee was not liable for club's alleged misrepresentations solely because of its status as assignee); Holts v. Tillman, 480 So. 2d 1134 (Miss. 1985) (holding that attorney's conduct did not establish intent to form a joint venture with property owners and that to establish such a joint venture would require a showing that attorney has a proprietary interest in lease agreement).

¹⁹³ For an exposition of these and other theories of lender liability, see S. Nickles, Lender Liability: Major Theories, Minnesota Continuing Legal Education 1986 Bankruptcy Institute (Sept. 18-19, 1986 Minneapolis, Minn.).

¹⁹⁴ 42 U.S.C. § 9607(b)(3) (1982).

ples regardless of the involuntary nature of the lender's acquisition of the land.

Three common law actions—strict liability, nuisance, and trespass—are the direct forebears of CERCLA liability and often provide additional sources of liability for a potential CERCLA defendant. In each of these common law causes of action, particularly strict liability and nuisance, a property owner is liable for injuries resulting from the use of its land. The owner's absence of moral culpability is virtually irrelevant. Instead, the theory for imposing such stringent liability is to prevent injuries and, failing that, to ensure compensation for victims.¹⁹⁵

A. Strict Liability

The most direct common law forbear of the CERCLA liability scheme is strict liability. Although strict product liability has evolved primarily during the past quarter century, the concept of strict liability originated more than a century ago. The doctrine developed in large part from the 1868 English decision, *Rylands v. Fletcher*.¹⁹⁶ The facts in that case parallel the factual settings in which CERCLA liability accrues.

In *Rylands*, the owners of a mill retained a contractor to construct a reservoir on their land.¹⁹⁷ Unknown to the owners, the reservoir was located over abandoned mine shafts. When the reservoir was partially filled with water, the water broke through the shafts, traveled through connecting passages, and damaged the plaintiff's property.¹⁹⁸ Despite the defendants' absence of moral culpability, the Court held them liable, employing language that applies with equal force to a hazardous waste site:

[I]f the defendants, not stopping at the natural use of their [land], had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into

¹⁹⁵ Although a site owner liable under CERCLA also often will be liable under one of these common law actions, CERCLA potentially provides important litigation advantages. CERCLA authorizes action against a site owner whenever "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a) (1982). In contrast, a plaintiff suing a site owner under one of the common law causes of action faces more difficult causation and procedural barriers. For a description of these problems, see Farber, *supra* note 22.

¹⁹⁶ L.R. 3 H.L. 330 (1868).

¹⁹⁷ Although the mill owners only leased the land on which their mill was located, the Court treated them as owning the land for purposes of the opinion. *Id.* at 338.

¹⁹⁸ Although the plaintiff's and defendants' properties were not adjoining, the court treated them as being so. *Id.* at 337.

the [land] that which, in its natural condition, was not in or upon it—for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the [land] of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose . . . of the escape of the water, and its passing away to the [land] of the plaintiff and injuring the plaintiff—then . . . the defendants would be liable.¹⁹⁹

If the term “hazardous waste” is substituted for the word “water” in this quotation, this passage describes the basic CERCLA liability scheme and demonstrates that a site owner could be held strictly liable under the common law for injuries caused by hazardous wastes from its site.

The concept of strict liability for nonnatural uses of land quickly took root in America. In fact, the Massachusetts Supreme Judicial Court applied the doctrine to a case involving percolating water in the same year that *Rylands* was decided.²⁰⁰ Three years later, the Minnesota Supreme Court applied the doctrine to another case involving underground water.²⁰¹ Although the course of the doctrine’s development has not always been a straight one, the strict liability concept is now a well-established part of our liability jurisprudence.²⁰² The First and Second Restatements of Torts both provide that a landowner is strictly liable for harm caused by hazardous activities on its land.²⁰³ The First Restatement defines this liability in terms of “ultrahazardous activity,”²⁰⁴ whereas the Second Restatement defines it in terms of “abnormally dangerous activity.”²⁰⁵ Such

¹⁹⁹ *Id.* at 339.

²⁰⁰ *Ball v. Nye*, 99 Mass. 582 (1868).

²⁰¹ *Cahill v. Eastman*, 18 Minn. 324 (1871).

²⁰² W. PROSSER & W. KEETON, *TORTS* § 78 (5th ed. 1984).

²⁰³ *RESTATEMENT OF TORTS* § 519 (1938); *RESTATEMENT (SECOND) OF TORTS* § 519 (1979).

²⁰⁴ Section 520 provides that:

An activity is ultrahazardous if it

(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
(b) is not a matter of common usage.

RESTATEMENT OF TORTS § 520 (1938).

²⁰⁵ Section 520 currently provides that:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

differences in terminology and in the precise parameters of liability under the First and Second Restatements are immaterial, however, when applied to a waste site that is releasing hazardous materials into waterways and neighboring lands. Dumping wastes that can seriously interfere with life and with the environment is an ultrahazardous and abnormally dangerous activity.²⁰⁶

The policy underpinnings of these common law concepts and of CERCLA are the same. Both attempt to ensure that situations that are dangerous to society are avoided or cured. The methods adopted to achieve this goal also are the same. By unavoidably tying liability to such an objective standard as property title, recourse and remedy are virtually guaranteed. Most important, the strict liability rule gives a property owner clear notice that it will be liable for injuries resulting from hazardous conditions on its land. The owner thus has a strong incentive to conduct its activities in a manner that will eliminate or reduce injuries. If injuries nevertheless result, the property owner is easily identifiable and owns at least one asset—the land—that can be applied to satisfy a judgment against it. In contrast, a person who does not own the land but merely conducts the operation, such as an independent contractor or lessee, may be difficult to locate or may be judgment proof. Thus, CERCLA may be viewed as

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- (b) likelihood that the harm that results from it will be great;
 - (c) inability to eliminate the risk by the exercise of reasonable care;
 - (d) extent to which the activity is not a matter of common usage;
 - (e) inappropriateness of the activity to the place where it is carried on; and
 - (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1979).

Although the Second Restatement characterizes this form of liability as being strict, the defendant's blameworthiness is inherent in a determination that the activity was abnormally dangerous under the factors set forth in § 520.

[The § 520 factors] consider the place where the activity is carried on, or consider alternatives to the activity. Such considerations permit notions of fault to get in by the back door, because the choice of place, the question of appropriateness of the activity to a particular place, or choices in the manner of conducting the activity invariably import notions of duty of care, responsibility and fault. This, in turn, places the heavy burden of proof back on the plaintiff.

REPORT OF THE SUPERFUND STUDY GROUP K-16, *quoted in* D. FARBER, *TOXIC TORTS AND VICTIM'S COMPENSATION PROPOSALS* 3 (1985).

²⁰⁶ Department of Env'tl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983). The court interpreted the Second Restatement as incorporating the *Rylands* test. *Id.* at 157. See also *THE LAW OF TORTS* § 78 (W. Keeton 5th ed. 1984); Comment, *Successor Landowner Liability for Environmental Torts: Robbing Peter to Pay Paul?*, 13 *RUTGERS L.J.* 329, 330–31 n.6 (1982).

a codification of common law strict liability, although it provides a third-party defense for innocent owners that did not exist at common law.

B. Nuisance

CERCLA's other forbear is nuisance doctrine.²⁰⁷ Like strict liability, nuisance imposes liability based on property ownership. Long before environmental protection statutes existed, nuisance doctrine prohibited a property owner from using its land in a way that unreasonably interferes with a right common to the general public (public nuisance)²⁰⁸ or with another property owner's use and enjoyment of its land (private nuisance).²⁰⁹ A leaking hazardous waste site constitutes both a public and a private nuisance under common law.

The Second Restatement's definition of a public nuisance states that an interference is unreasonable if: (1) it involves a significant interference with the public health, safety, peace, comfort, or convenience; (2) the conduct is proscribed by law; or (3) the conduct is continuing or has produced a long-lasting effect and, as the defendant knows or has reason to know, has a significant effect upon the public right.²¹⁰ Because CERCLA authorizes EPA to clean a site and to charge the owner for response costs only after the site has been identified as presenting an imminent and substantial danger to the public health,²¹¹ any site subject to CERCLA cleanup also would constitute a public nuisance under the common law.²¹² Thus, CERCLA liability is, in a sense, a codification of a specific instance of common law public nuisance and serves the same preventive and compensatory goals.

The Second Restatement of Torts defines a private nuisance as "a structure or other condition erected or created on [one's]

²⁰⁷ One commentator has described nuisance as "the common law backbone of modern environmental law." *THE SUPERFUND CONCEPT*, *supra* note 1, at 23.

²⁰⁸ *RESTATEMENT (SECOND) OF TORTS* § 821B (1979).

²⁰⁹ *Id.* § 821D. Comment a to § 821D states that the private nuisance action dates to the twelfth century.

²¹⁰ *Id.* § 821B.

²¹¹ 42 U.S.C. § 9604(1) (1982).

²¹² See *THE SUPERFUND CONCEPT*, *supra* note 1, at 23-24; Comment, *supra* note 206, at 329-32; Comment, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 *RUTGERS L.J.* 117, 125-28 (1980) [hereinafter Comment, *Remedies for Hazardous Waste Injuries*].

land which causes a continuing invasion of [another's] land."²¹³ If a dump site has leaked hazardous wastes onto neighboring lands, the dump site owner may be held liable for damages caused on neighboring lands. Thus, neighboring landowners may sue the site owner on a private nuisance cause of action.

C. Trespass

Trespass is the third of CERCLA's common law antecedents and an additional cause of action upon which lender/owners may be sued. Though it is a more limited action than CERCLA, trespass liability more closely parallels the CERCLA liability of an innocent owner than does strict liability or nuisance. Like CERCLA, a trespass action focuses on land ownership. Liability in trespass, however, is less than strict. To establish a cause of action for trespass, a plaintiff must prove not only that pollutants physically invaded its land,²¹⁴ but also that the defendant knowingly or negligently caused the invasion.²¹⁵

Some courts have held that constructive notice to the defendant may be sufficient to support liability in trespass.²¹⁶ However, at least one court has held that a defendant was not liable in trespass even though he intentionally discharged pollutants on his land, because he did not know that subterranean currents or other conditions would carry the pollutants to the plaintiff's land.²¹⁷ In light of the problems of proof and the availability of alternative theories of recovery, plaintiffs rarely rely on the trespass theory even if their land or water has been damaged by pollutants.²¹⁸ The trespass theory, however, like strict liability and nuisance, demonstrates that under traditional notions a property owner may be held liable for injuries caused by conditions on its land. CERCLA's liability scheme reflects this same notion.

²¹³ RESTATEMENT (SECOND) OF TORTS § 201 comment b (1979).

²¹⁴ W. PROSSER, THE LAW OF TORTS § 89, at 594 (4th ed. 1971).

²¹⁵ *Hudson v. Peavey Oil Co.*, 279 Or. 3, 6-7, 566 P.2d 175, 177 (1977); see RESTATEMENT (SECOND) OF TORTS § 166 (1979).

²¹⁶ *Elsy v. Adirondack & St. L. Ry. Co.*, 97 Misc. 273, 277, 161 N.Y.S. 391, 393 (Sup. Ct. 1916); *Furrer v. Talent Irrigation Dist.*, 258 Or. 494, 513, 466 P.2d 605, 615 (1970).

²¹⁷ *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331, 121 N.E.2d 249, 251 (1954).

²¹⁸ Comment, *Remedies for Hazardous Waste Injuries*, *supra* note 212, at 126.

D. Negligence

Unlike strict liability, nuisance, and trespass, negligence focuses less on property ownership in the hazardous waste context than on duty. A suit for negligence will lie against the owner of a hazardous waste site if the owner breached a duty of reasonable care owed to the plaintiff, thereby proximately causing a foreseeable injury to the plaintiff.²¹⁹ The focus on foreseeability distinguishes negligence from CERCLA's basic liability scheme, although foreseeability does affect the availability of the third-party defense. An innocent owner can qualify for that defense only if it exercised due care, which inevitably requires an analysis of the foreseeability of the injury.

The dangerous nature of hazardous waste sites and the gravity of the injuries that can result from their negligent operation or maintenance place a high standard of care on a site owner.²²⁰ Thus, if hazardous materials are escaping from the site, particularly to the degree necessary to prompt an EPA cleanup, a plaintiff in a private action for negligence may be able to establish that the defendant did not satisfy its duty of reasonable care.²²¹ The unique characteristics of hazardous waste litigation, however, may enable the site owner to escape liability for negligence although it might be unable to do so under CERCLA. A defendant, particularly one that owned the site before the dangers of pollution were fully recognized and while disposal techniques were less effective, might avoid liability for negligence by establishing that it acted reasonably in light of the state of knowledge and technology at that time. Thus, the basic CERCLA liability scheme is more closely related to strict liability and to nuisance than to negligence.

E. Successor Owner Liability

As established by the above analysis, the common law imposes tort liability on a property owner that creates a hazardous waste site that causes injury. Whether a subsequent site owner also is liable, though no dumping occurred during its ownership,

²¹⁹ W. PROSSER & W. KEETON, *supra* note 202, § 30, at 164-65.

²²⁰ *Id.* at 171; Comment, *Remedies for Hazardous Waste Injuries*, *supra* note 212, at 123.

²²¹ See, e.g., *Ewell v. Petro Processors of Louisiana, Inc.*, 364 So. 2d 604, 606 (La. Ct. App. 1978).

is more problematic. Like CERCLA, the common law does not exempt a property purchaser from liability solely because it did not create the hazard or because it owned the site for only a short time before the injury occurred. Under common law, the purchaser is liable if it knew or should have known of the wastes and if it had a reasonable opportunity to correct the condition.²²² In case after case, courts have held property purchasers liable for injuries resulting from artificial conditions that existed on the land when the purchasers acquired the property.²²³

The most frequently cited case on this issue is *Palmore v. Morris*.²²⁴ In *Palmore*, a boy was injured when a negligently maintained gate fell on him. The accident occurred twenty hours after the property on which the gate was located had been sold. In holding that the purchaser, rather than the seller, was liable for the boy's injuries, the court stated:

Before he purchased the real estate, the law presumes the grantee examined the property, and was cognizant of its situation, surroundings, the character of the structures upon it, and their condition of repair. Without an express covenant by the grantors, as between them and the grantee, there was no duty on the grantors to repair. The purchaser thereafter assumed that duty because he then became the owner and occupant. . . . There may be a case where the grantor conceals from the grantee a defect in a structure, known to him alone, and not discoverable by careful inspection, that the owner would be held liable, though out of possession; but that is not this case.²²⁵

The case presents a species of title liability. Under this analysis, whether the vendee created the condition or affirmatively contributed to it is irrelevant. Rather, the vendee's possession

²²² Section 336 of the Second Restatement of Torts provides:

One who takes possession of land upon which there is an existing structure or other artificial condition unreasonably dangerous to persons or property outside of the land is subject to liability for physical harm caused to them by the condition after, but only after,

(a) the possessor knows or should know of the condition, and
(b) he knows or should know that it exists without the consent of those affected by it, and
(c) he has failed, after a reasonable opportunity, to make it safe or otherwise to protect such persons against it.

RESTATEMENT (SECOND) OF TORTS § 366 (1979). See also *id.* § 839.

²²³ See, e.g., *Central Consumers' Co. v. Pinkert*, 122 Ky. 720, 92 S.W. 957 (1906); *Palmore v. Morris*, 182 Pa. 82, 37 A. 995 (1895); W. PROSSER, *THE LAW OF TORTS* (W. Keeton 5th ed. 1984); Annotation, *Liability of Purchaser of Premises for Nuisance Thereon Created by Predecessor*, 14 A.L.R. 1094 (1921).

²²⁴ 37 A. 995 (1895).

²²⁵ *Id.* at 999.

and control of the land is dispositive. Again, responsibility follows title without more:

Any future possession [by the seller] in face of his deed, unless there be an independent stipulation to the contrary, would be a palpable trespass; and with his surrender of possession all the duties incident to ownership, as to him, were at an end. From the moment [the purchaser] took possession under his deed the duties theretofore incumbent on [the seller] were transferred to him, and he became answerable to the public for neglect in their performance.²²⁶

Because the vendee has exclusive control over the land through the acquisition of title, it is liable at common law for injuries resulting from harmful conditions on the land.

A few states have adopted statutes codifying this common law principle.²²⁷ For example, section 7.48.170 of the Washington Revised Code provides: "Every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property caused by a former owner, is liable therefore in the same manner as the one who first created it."²²⁸ Courts have not afforded lenders any special protection from the operation of these statutes. In *Pierce v. German Savings & Loan Society*,²²⁹ for example, the California Supreme Court applied a similar statute to hold a mortgagee that acquired title to the encumbered land liable for damages resulting from a nuisance that existed on the land before the lender acquired it.²³⁰ Thus, lenders that acquire title are no more shielded by their status as lenders than are any other property purchasers.

CERCLA's withholding of lender immunity parallels the common law. A lender that acquires title to a waste site normally will be liable under the common law rule of vendee liability in the same circumstances that it will be liable under CERCLA. As under CERCLA, an institutional lender's sophistication and expertise with respect to land will make it difficult for the lender to avoid common law liability by claiming absence of notice.²³¹ On the other hand, if the lender successfully establishes the lack of notice defense, it will be exempt from liability not only under

²²⁶ *Id.* at 998-99.

²²⁷ See, e.g., CAL. CIV. CODE § 3483 (West 1970); IDAHO CODE § 52-109 (1979); WASH. REV. CODE ANN. § 7.48.170 (1961).

²²⁸ WASH. REV. CODE ANN. § 7.48.170 (1961).

²²⁹ 72 Cal. 180, 13 P. 478 (1887).

²³⁰ *Id.* at 479.

²³¹ See *supra* notes 123-39 and accompanying text.

the common law, but also under the third-party defense to CERCLA liability.

CERCLA and the common law conflict in an important manner, however. If a lender/owner acquires the contaminated property without actual or constructive notice of the waste, it can retain its immunity from CERCLA liability, even if, after discovering the waste, it exercises the due care required by the third-party defense provision.²³² Apparently, the statutory due care standard does not impose a duty on the owner to eliminate the hazard, because the owner will not be liable for cleanup costs if the government or another authorized party cleans the site. Although the third-party defense provision expressly exempts an innocent owner from liability only for response costs,²³³ thereby creating an inference that the third-party defense will not protect the owner from a judicial order to clean the site issued pursuant to section 106,²³⁴ such an interpretation is unlikely because it could render the third-party defense meaningless.²³⁵ Under the common law, on the other hand, the lender/owner will be liable for injuries caused by the hazardous condition after it has had a reasonable opportunity to discover the condition and to correct it.²³⁶ Additionally, the new owner potentially will be subject to a common law action to abate the public nuisance.²³⁷

A court could circumvent this conflict by holding that CERCLA preempts the common law with respect to hazardous waste sites. CERCLA, however, does not address personal injury actions. It deals only with the procedures for cleaning hazardous waste sites and the mechanisms for financing cleanups, whether the cleanup is conducted by the owner or by some other entity. Moreover, imposing liability for personal injury and private property damage creates an incentive for even an innocent owner to clean the site, though this factor brings the preemption argument back full circle. The abatement question also presents a difficult preemption issue because EPA has identified only a fraction of the country's waste sites for CERCLA cleanups.²³⁸

²³² W. PROSSER & W. KEETON, *supra* note 221, § 64, at 449-50.

²³³ 42 U.S.C. § 9607(b)(3) (1982).

²³⁴ 42 U.S.C. § 9606 (1982).

²³⁵ See 1A F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02[e] (1987).

²³⁶ See RESTATEMENT (SECOND) OF TORTS § 366 (1979).

²³⁷ See *id.* § 821C.

²³⁸ EPA *Seeks Comments on 64 Proposed Sites to be Added to the National Priorities List*, *supra* note 4, at 1725.

The remaining waste sites could constitute public nuisances even though EPA has not targeted them for cleanup.

The salient point is that CERCLA imposes no greater burden on innocent landowners than the common law and, in some regards, may impose a lesser burden. Subsection 107(a) liability for response costs parallels the common law doctrines of strict liability and nuisance by tying liability to property ownership without regard to fault. The third-party defense of subsection 107(b)(3) potentially eliminates this liability for a lender/owner by providing a circumstance under which it will be held to only a standard of due care, rather than of strict liability. The exact parameters of the statutory due care standard for an innocent lender/owner, however, have yet to be defined.

IV. SCOPE OF LENDER/OWNER'S CERCLA LIABILITY

Identifying lender/owners as potential CERCLA defendants is only the first step in assessing the Act's impact on them. In the usual case, the lender/owner is only one of many parties that is liable under CERCLA for response costs. Apportionment of liability, therefore, is a salient issue and, in view of the enormity of response costs, a very important one. Because lenders normally are perceived as having deeper pockets than other potential defendants, lenders will be particularly attractive targets to a cost-conscious EPA. Part IV of this Article examines the scope of a lender/owner's liability for response costs on two levels: (1) the amount of response costs that a court can assess against a lender/owner in a cost recovery action; and (2) the portion of those costs that the lender/owner can recover from others.

In lieu of an express provision concerning the scope of section 107 liability, CERCLA applies the same standard of liability imposed in another federal environmental act, the Clean Water Act.²³⁹ Like CERCLA, however, the Clean Water Act leaves several basic liability issues open. Therefore, courts deciding CERCLA cost recovery actions must formulate the necessary common law. From the earliest CERCLA cases, courts have held that federal, rather than state, common law should con-

²³⁹ Clean Water Act, 33 U.S.C. § 1321 (1982).

trol.²⁴⁰ Therefore, courts deciding CERCLA cases have been free to establish the liability rules that will best serve CERCLA's purposes unconstrained by state law.

A. Amount of Response Costs

The courts uniformly have held that a CERCLA defendant may be held jointly and severally liable for response costs.²⁴¹ Therefore, a lender/owner sued for response costs may be liable for the entire amount of the costs. Although some courts have stated that the applicability of joint and several liability in a CERCLA cost recovery action should be determined on a case-by-case basis,²⁴² imposition of joint and several liability undoubtedly will be the norm when EPA institutes a cost recovery action because this standard provides important advantages to EPA.²⁴³

First, joint and several liability significantly simplifies EPA's pretrial investigations and its burden of establishing liability during the trial. Rather than finding and suing each potential

²⁴⁰ See, e.g., *Colorado v. ASARCO*, 608 F. Supp. 1484, 1489 (D. Colo. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-10 (S.D. Ohio 1983). The courts have cited a variety of sources for this proposition. See *Toxic Waste Note*, *supra* note 4, at 1526. A waste site owner is entitled to contribution not only when it has paid EPA's response costs, but also when it has cleaned the site. See, e.g., *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913 (N.D. Okla. 1987).

²⁴¹ See, e.g., *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1083-84 & n.9 (D. Colo. 1985); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); *United States v. Wade*, 577 F. Supp. 1326, 1338-39 (E.D. Pa. 1983); *Chem-Dyne*, 572 F. Supp. at 810.

²⁴² For economic analyses of joint and several liability, see Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517 (1980); Ulen, Hester & Johnson, *Minnesota's Environmental Response and Liability Act: An Economic Justification*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,109, 10,113 (1985); Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157, 1182-95 (1982); Note, *Allocating Costs*, *supra* note 1, at 584.

²⁴³ Although early versions of CERCLA expressly provided for joint and several liability, the provision was deleted from the final version to ensure the Act's passage. See 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph (D-W. Va.)); *Sand Springs Home*, 670 F. Supp. at 915. SARA's legislative history indicates, however, that Congress agreed with the courts' imposition of joint and several liability. See, e.g., 131 CONG. REC. H11,073 (daily ed. Dec. 5, 1985) (statement of Rep. Eckart (D-Ohio)):

The Committee on Energy and Commerce and the other committees involved in this bill fully subscribe to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corporation*, 572 F. Supp. 802 (S.D. Ohio 1983), which has established a uniform Federal rule allowing for joint and several liability in appropriate CERCLA cases. . . . Thus, nothing in this bill is intended to change the application of the uniform Federal rule of joint and several liability enunciated by the Chem-Dyne court.

See also 1A F. GRAD, *supra* note 235, § 4A-89 ("SARA, rather than directly addressing a central issue such as the strict, joint and several standard of liability in statutory language, makes the judicial opinions on this subject part of its legislative history.").

section 107 defendant, EPA can choose one or more defendants based on accessibility, ability to satisfy a judgment, and on the facility with which EPA can establish their liability.²⁴⁴ Although a section 107 defendant may implead other potentially responsible parties, it will bear the burden and expense of locating and joining those parties and of proving their liability.²⁴⁵

Second, joint and several liability dramatically simplifies EPA's burden of proving causation. In the absence of joint and several liability, EPA could recover damages from a defendant only to the extent that EPA could prove the actual amount of damage that a particular defendant caused. This burden of proof usually would be impossible to satisfy because it would require EPA to establish the precise amount of each type of hazardous substance that has been released from the waste site as well as the identities of the generators and transporters of the hazardous substances, the site operators, and the site owners. The variety of activities in which potential section 107 defendants engage compounds the problem of establishing the amount of damage that each defendant caused.²⁴⁶

Finally, joint and several liability enhances EPA's ability to recover all of its response costs. In the absence of joint and several liability, EPA could recover the full amount of its response costs only if all responsible parties could be located and were sufficiently solvent to pay their portion of the response costs. For all the above reasons, joint and several liability is an appropriate common law liability doctrine for EPA response cost recovery actions.²⁴⁷

²⁴⁴ See Dubuc & Evans, *Recent Developments Under CERCLA: Toward a More Equitable Distribution of Liability*, 17 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,197, 10,197 (1987).

²⁴⁵ The legislative history indicates that this was a reason for imposing joint and several liability:

[T]he effect of the decision [imposing joint and several liability] was to require the defendants, rather than the plaintiff, to show that other tortfeasors contributed to the harm and in what quantities they so contributed. This incentive to locate all other responsible parties is one of the prime considerations underlying use of joint and several liability in pollution suits. In fact, in addition to shifting the burden of proving the cause of plaintiff's injury, the court placed on the sued defendants ultimate responsibility for bringing any other defendants into the suit as codefendants. Facing the prospect of either proving that other parties were also responsible for the injury or paying the full judgment themselves, defendants would henceforth have incentive to insure that no parties have been inadvertently omitted from the suit.

126 *CONG. REC.* 26,784 (1980) (statement of Rep. Gore (D-Tenn.)).

²⁴⁶ Note, *Hazardous Waste and the Innocent Purchaser*, 38 *FLA. L. REV.* 253, 263 (1986).

²⁴⁷ If the waste site owner or another entity specified in 42 U.S.C. § 9607(a) (1982)

B. Lender/Owners' Right to Contribution

The right to contribution may be considered the corollary of joint and several liability. If a court holds a lender/owner jointly and severally liable for response costs, CERCLA's goals normally will be furthered by permitting the lender/owner to recoup all or a portion of the damages from the other responsible parties specified in subsection 107(a).²⁴⁸ Thus, in addition to any other remedies the lender/owner may have, such as insurance coverage or a cause of action against the former owner for misrepresentation or failure to disclose a material defect in the property,²⁴⁹ the lender/owner can sue other responsible parties for contribution. The right to contribution is particularly important in light of the discretion joint and several liability affords EPA.²⁵⁰

Before SARA, no clearly recognized right to sue for contribution for response costs existed, particularly in light of the relatively recent recognition in America of a right to contribution among joint tortfeasors.²⁵¹ CERCLA did not expressly create a right of contribution, although subsection 107(e)(2) arguably contemplated its availability: "Nothing in this subchapter . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section . . . has or would have, by reason of subrogation or otherwise against any person."²⁵² Although this section could be construed as applying only to contractual rights, a few courts have permitted a con-

cleans the site and brings a cost recovery action, on the other hand, a court might determine that the equities of the case do not justify imposition of joint and several liability.

²⁴⁸ 42 U.S.C. § 9607 (1982).

²⁴⁹ *Obde v. Schlemeyer*, 56 Wash. 2d 449, 353 P.2d 672 (1960); W. PROSSER & W. KEETON, *supra* note 202, § 106; Keeton, *Fraud—Concealment and Non-disclosure*, 15 TEX. L. REV. 1, 18–21 (1936). If the lender acquired the property at a foreclosure sale, the former owner probably will not have made any such representations and thus will not have a duty to disclose defective conditions on the property.

²⁵⁰ In *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 914 (N.D. Okla. 1987), for example, EPA instituted a CERCLA administrative proceeding against a site owner and refused the owner's request that EPA join the waste generators because of "the emergency nature of the situation and the fact it would require a lengthy time period to identify and join the generators in such proceedings." Similarly, in *Colorado v. ASARCO, Inc.*, 688 F. Supp. 1484, 1485 (D. Colo. 1985), EPA did not join hundreds of potentially liable parties. In *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984), EPA sued only seven potentially responsible parties. Three of the defendants each had contributed less than two percent of the waste. The defendants filed third-party claims against 154 generators, 16 insurance companies, and 14 federal agencies.

²⁵¹ *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 86–88 & nn.16–17 (1981); W. PROSSER & W. KEETON, *supra* note 202, § 50.

²⁵² 42 U.S.C. § 9607(e)(2) (1982).

tribution action on the basis of this language alone.²⁵³ Other courts have authorized such suits as a matter of federal common law.²⁵⁴ The latter have reasoned that contribution should be a normal concomitant of joint and several liability when the defendant is not guilty of willful wrongdoing.²⁵⁵

SARA has settled the debate on the right to contribution for response costs by expressly providing for a right of contribution against "any other person who is liable or potentially liable under section 107(a). . . ."²⁵⁶ Moreover, the new subsection 113(f) expressly provides that CERCLA contribution actions are governed by federal law and must be brought in accordance with the Federal Rules of Civil Procedure. This clarification is especially helpful because not all states permit an action for contribution among parties that are jointly and severally liable.²⁵⁷

SARA's contribution provision provides relief to a CERCLA defendant in two ways. First, it reduces a defendant's litigation costs by eliminating the need to litigate the issue of whether a contribution action is available.²⁵⁸ Second, the liberal joinder provisions of the Federal Rules of Civil Procedure, in conjunction with the contribution provision from SARA, provide CERCLA defendants with a relatively efficient and cost effective means of pursuing other potentially liable parties.²⁵⁹ The joinder and contribution provisions minimize the time between the de-

²⁵³ *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 995 n.8 (D.S.C. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807 n.3 (S.D. Ohio 1983).

²⁵⁴ *United States v. New Castle County*, 642 F. Supp. 1258, 1265-69 (D. Del. 1986); *ASARCO, Inc.*, 608 F. Supp. at 1484; *United States v. Ward*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,804 (E.D.N.C. 1984).

²⁵⁵ See *CERCLA 1985: A Litigation Update*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,395, 10,403 (1985).

²⁵⁶ 42 U.S.C. § 9613(f) (1982).

²⁵⁷ *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 87 n.17 (1981).

²⁵⁸ Although courts uniformly have granted a right to contribution for CERCLA response costs, "the issue was continually being contested by third-party defendants." Dubuc & Evans, *supra* note 244, at 10,200.

²⁵⁹ Rule 14(a) of the Federal Rules of Civil Procedure provides that, at any time after an action is commenced, a defendant may implead "a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." FED. R. Civ. P. 14(a). Thus, even though the right to contribution does not vest until a person actually pays more than her share of the damages, Rule 14(a) enables a third-party plaintiff to establish the liability of other responsible parties in the same suit in which EPA establishes the third-party plaintiff's liability. See, e.g., *Adalman v. Baker, Watts & Co.*, 599 F. Supp. 752 (D. Md. 1984), *aff'd in part, rev'd in part*, 807 F.2d 359 (4th Cir. 1986); *Tri-Ex Enter., Inc. v. Morgan Guar. Trust Co. of New York*, 586 F. Supp. 930 (S.D.N.Y. 1984); *Vaughn v. Terminal Transp. Co.*, 162 F. Supp. 647, 648-49 (E.D. Tenn. 1957).

fendant's payment to EPA and its recovery of a portion of those costs from the other responsible parties. Additionally, the cost of a second trial is avoided, and the defendant avoids the possibility of inconsistent holdings on the evidence.²⁶⁰

In addition to codifying the right to contribution, new subsection 113(f) adopts an equitable method of apportioning damages among the responsible parties,²⁶¹ which should aid lender/owners. Contrary to the equitable apportionment method prescribed by subsection 113(f), the majority of courts apply a rule of pro rata contribution.²⁶² The pro rata method, in contrast, often would result in a lender/owner bearing a share of damages disproportionate to its fault. Unlike the other entities liable under subsection 107(a)—waste generators, waste site operators, and waste transporters²⁶³—the innocent lender/owner will not have actively contributed to the hazardous waste problem. Although the lender/owner does benefit from the cleanup, that benefit often will be of significantly less value than the lender's pro rata share of damages.

Because of the failings of the pro rata method, the recent trend in tort damage apportionment has been to assess damages according to the defendant's relative degree of fault.²⁶⁴ New

²⁶⁰ *Bosin v. Minneapolis, St. Paul & S. Ste. M. R.R. Co.*, 183 F. Supp. 820, 823 (E.D. Wis. 1960), *aff'd sub nom. Minneapolis, St. P. & S. Ste. M. R.R. Co. v. Fond du Lac*, 297 F.2d 583 (7th Cir. 1961); 3 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 14.04, at 14-26 (2d ed. 1985). One commentator has argued that courts usually should sever the contribution action from the government's CERCLA suit in order to permit the government to recover its response costs in the shortest possible time. Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 NOTRE DAME L. REV. 345, 367 (1985).

²⁶¹ 42 U.S.C. 9613(f) (1982).

²⁶² RESTATEMENT (SECOND) OF TORTS § 886A n.h (1979). *See also* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(b). Under this method, if ten parties are liable for an injury, each is responsible for ten percent of the damage award, regardless of its relative fault.

²⁶³ 42 U.S.C. § 9607(a) (1982).

²⁶⁴ RESTATEMENT (SECOND) OF TORTS § 886A n.h (1979). Thus, if two people cause an injury and one is 75 percent responsible, that person will be liable for 75 percent of the damages. At least one state trial court has apportioned damages in a contribution action under state hazardous waste cleanup act. In *Advance Circuits, Inc. v. Carriere Properties*, File No. 84-3316 & -4591 (Minn. Dist. Ct. 1987), waste generators that had generated wastes dumped at a particular site paid the cost of cleaning the site and filed a contribution action against the site's owners and operators. The court held that the generators were entitled to recover 70 percent of the cleanup costs from the defendants. The court based its apportionment on its findings that: (1) the defendants' "actions and inactions were the substantial and material contributing cause of the release and threat of release of hazardous substances at the site"; (2) almost all the hazardous materials on the site were by-products of the defendants' operations on the site; (3) the defendants were "completely and uniquely responsible for the care exercised in the treatment and storage of materials"; (4) the defendants were uncooperative with the government agen-

subsection 113(f) adopts this more equitable approach. It provides: "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."²⁶⁵ This language evidently contemplates that courts will consider relative fault, which is consistent both with EPA's position concerning allocation of liability²⁶⁶ and with the developing area of federal contribution actions.²⁶⁷ This result also addresses the concern expressed by some legislators in considering CERCLA that joint and several liability for response costs "may be expedient, but it certainly flies in the face of fundamental fairness and equity."²⁶⁸

cies in dealing with the problem; and (5) one of the defendants had represented himself as being "well-trained and expert in the area of recycling" and "implicitly aware of the hazardous nature of the substances he was accepting and treating." On the other hand, the court found that the plaintiff generators had (1) contributed to the release only by relying on the defendants' representations concerning proper handling of the hazardous materials; (2) delivered their hazardous wastes to the defendants; and (3) cooperated with the government officials.

²⁶⁵ 42 U.S.C. § 9613(f) (1982).

²⁶⁶ See *infra* notes 271-73 and accompanying text. In a speech before the Environmental Risks for Lenders Conference, an EPA Deputy Associate Enforcement Counsel stated that, before suing a lender/owner under § 107, EPA will attempt to determine whether the lender is an innocent owner. If EPA believes that a lender is innocent, EPA will not file suit against it or will enter into a de minimis settlement with it pursuant to § 122(g). 42 U.S.C.A. § 9622(g) (West Supp. 1987). Leifer Paper, *supra* note 26, at 5.

²⁶⁷ At least one federal district court has indicated that it would apportion CERCLA damages in a contribution action. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 995 (D.S.C. 1984) ("[A]rbitrary or theoretical means of cost apportionment do not diminish the indivisibility of the underlying harm, and are matters more appropriately considered in an action for contribution between responsible parties after plaintiff has been made whole."). See also *Kohr v. Allegheny Airlines*, 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) ("[T]he better rule is that of contribution and indemnity on a comparative negligence basis."); *Gomes v. Brodhurst*, 394 F.2d 465, 469 (3d Cir. 1968) ("On balance the equities inherent in a comparative negligence system convince us of its ultimate merit."); *McLean v. Alexander*, 449 F. Supp. 1251, 1272 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) ("[E]quity demands consideration of the relative degrees of fault painfully evident in this case."). Cf. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 n.4 (8th Cir. 1979) (using pro rata apportionment of damages because the determination of exact degrees of fault in a complicated antitrust case would be difficult and because pro rata contribution serves as a more effective deterrent than comparative shares); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 136 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds*, 540 F.2d 27 (2d Cir. 1976) (using pro rata apportionment because the determination of comparative shares would be too confusing in a securities fraud case in which one defendant prepared and disseminated misleading report and was encouraged to do so by the other defendant who was equally aware of the misleading nature of the report).

Two commentators have argued that, in addition to assessing the relative degrees of fault in causing the harm, courts apportioning liability also should consider the degree to which each party cooperated with the government in cleaning the site. Garber, *supra* note 143, at 387-88; Note, *The Right to Contribution for Response Costs Under CERCLA*, *supra* note 260, at 365-66.

²⁶⁸ 1980 U.S. CODE CONG. & ADMIN. NEWS 6143. See also 126 CONG. REC. 30,972

SARA permits a court to go beyond the regular apportionment of damages rule, however, to distribute CERCLA liability more equitably. Under the usual apportionment rule, the plaintiff in a contribution action can recover only that portion of the damages that the defendants caused.²⁶⁹ Thus, if a potential defendant cannot be joined because it no longer exists, is insolvent, or is otherwise unavailable, that party's potential contribution is simply lost. Under these circumstances, the plaintiff must bear the portion of damages attributable to that party's actions, as well as the portion attributable to its own share of fault.

Subsection 113(b), however, may provide courts with sufficient latitude to avoid this result. In some cases, it will be equitable and appropriate for a court to apportion the full amount of damages among the parties to the contribution action even if not all responsible persons have been joined. Such a result is particularly appropriate when an attractive, though relatively blameless, defendant, such as a lender/owner, is saddled with a judgment for the full amount of response costs. Furthermore, the possibility that the court will spread the entire liability among the parties to the contribution action creates an incentive for the defendants to locate other responsible parties. Expansion of the apportionment rule will help to assure that the costs of hazardous waste releases are borne by the parties that cause them and will spread some of the transaction costs that the defendant in the original response cost recovery action otherwise would have to bear. Moreover, the probability of a negotiated settlement increases as the percentage of potentially responsible parties joined in the contribution action increases.

A liberal interpretation of subsection 113(f) is consistent with new section 122, which authorizes EPA to negotiate settlements. To promote expeditious settlements, SARA authorizes EPA to prepare a nonbinding preliminary allocation of responsibility (NBAR) that allocates 100 percent of the responsibility among the potentially responsible parties specified in subsection 107(a).

(1980) (statement of Sen. Helms (R-N.C.)) ("Retention of joint and several liability in S. 1480 received intense and well-deserved criticism from a number of sources, since it could impose financial responsibility for massive costs and damages awards on persons who contributed only minimally (if at all) to a release or injury.").

²⁶⁹ RESTATEMENT (SECOND) OF TORTS § 886A(2) (1979) ("No tortfeasor can be required to make contribution beyond his own equitable share of the liability."). In comment c, however, the Restatement states that "the court may be expected to do what is fair and equitable under the circumstances" if, for example, one of the joint tortfeasors is insolvent or is outside of the court's jurisdiction. *Id.* § 886A at comment c.

The statute directs EPA in preparing the NBAR to consider *inter alia* "ability to pay" and "inequities and aggravating factors."²⁷⁰ The inclusion of these considerations contemplates an apportionment of liability based on considerations other than fault and confirms that the entire liability may be assessed against fewer than all of the potentially responsible parties.

Although EPA is still in the process of preparing guidelines governing the allocation of liability for owners and operators,²⁷¹ it has indicated that liability for settlement purposes will not necessarily be determined on a strict fault basis. EPA has stated, for example, that allocation of liability to owners and operators "is a case-specific decision based upon consideration of the settlement criteria," such as those listed above.²⁷² Of course, the settlement procedures and considerations are designed to benefit EPA by expediting settlements, thereby reducing transaction costs, and not necessarily to benefit potentially responsible parties. New section 122 does reflect, however, that response costs may be allocated among less than all the responsible parties.²⁷³

Even if a court deciding a CERCLA contribution action is willing to apportion liability based on relative degrees of fault and to spread the entire liability among the parties before it, a lender/owner that files a contribution action may still confront significant obstacles. Hundreds of potentially responsible parties may have contributed to the waste site. Joining a substantial percentage of them will place an enormous discovery and litigation burden on the lender/owner. Additionally, if the lender/

²⁷⁰ 42 U.S.C.A. § 9622(e)(3)(A) (West Supp. 1987). See also Superfund Program; Non-binding Preliminary Allocations of Responsibility (NBAR), 52 Fed. Reg. 19,919 (1987).

²⁷¹ The EPA Office of Enforcement and Compliance Monitoring has stated that guidelines for owners will be published in the Federal Register in April of 1988. Telephone interview with Anna Thode, EPA Office of Enforcement and Compliance Monitoring, Waste Enforcement Division (Mar. 8, 1988).

²⁷² Superfund Program; Non-binding Preliminary Allocations of Responsibility, *supra* note 270, at 19,920. The EPA comments reflect an intent to incorporate the types of factors normally considered by a court applying a pure apportionment theory. EPA's request for comments on the NBAR procedure states, for example, that:

In general, owner/operator culpability is a significant factor in determining the percentage of responsibility to be allocated. For example, a commercial owner and/or operator that managed waste badly should receive a higher allocation than a passive, noncommercial landowner that doesn't qualify as innocent. . . . The relative allocation among successive owners and/or operators may be determined, where all other circumstances are equal, by the relative length of time each owned and/or operated the site.

Id. New section 122, however, reveals that these factors are to be tempered by equitable considerations. 42 U.S.C.A. § 9622 (West Supp. 1987).

²⁷³ 42 U.S.C.A. § 9622 (West Supp. 1987).

owner impleads these parties in an EPA cost recovery action, a court probably will sever the contribution action from the main action pursuant to Rule 42(b),²⁷⁴ on the ground that EPA needs to recover its response costs as quickly as possible to replenish its fund for cleanups. This efficiency rationale was a primary reason for creating joint and several liability. Thus, the lender/owner's recovery will be delayed, and it incurs the cost of a second trial. In this situation, the lender/owner has strong incentive to avoid litigation by entering into a negotiated settlement.

Because CERCLA does not specifically address the scope of liability, courts have the opportunity to create federal common law tailored to serve CERCLA's goals. The enormity of the task of rehabilitating thousands of waste sites justifies imposing joint and several liability in an EPA cost recovery action because this liability scheme minimizes both litigation costs and the time for recovery of response costs, thereby furthering the cleanup effort. Perhaps most important, the specter of joint and several liability creates a strong incentive for a party that was only minimally involved with the site, such as a lender/owner, to settle.

If a party is held jointly and severally liable, waste site cleanups and the related cost recovery actions will not be adversely affected if courts creating the new CERCLA contribution rules are flexible in their awards. Courts should reject pro rata apportionment of liability as being too inflexible. Instead, courts should apportion liability according to the parties' relative degrees of fault. In this way, a party is more likely to internalize the full costs of its conduct, and would not be forced to internalize more than the share of costs attributable to its conduct. Courts also should reject the equally inflexible rule that the defendant in the initial cost recovery action must ultimately bear liability not only for its actions, but also for the actions of all other responsible parties that were not joined in the contribution action. By adopting a flexible, fact-oriented approach to liability apportionment, courts can increase the effectiveness and fairness of the CERCLA liability scheme.

²⁷⁴ FED. R. CIV. P. 42(b).

V. CONCLUSION

Dumping hazardous wastes formerly appeared to be a relatively cheap and convenient disposal method. It was cheap and convenient, however, only because of the limited information available concerning the effects of dumping. Participants in hazardous waste-related industries were not required to absorb the cost of negative externalities generated by dumping or, more important, to prevent or to reduce such externalities by employing safe disposal methods. Catastrophes such as Love Canal have focused national attention on the problem by dramatically demonstrating the threat to human life and to the environment posed by many waste sites. CERCLA authorizes EPA to clean a leaking hazardous waste site and to recover its response costs from those that have benefited from the dumping and cleanup activities, including lender/owners.

The prospect of CERCLA liability surprised most lenders, although the potential for environmentally related liability existed under other federal and state acts. The prospect is particularly alarming to lenders because the magnitude of that liability often will substantially exceed a lender's investment in the land. Furthermore, some lenders will feel trapped by the liability provisions because they did not acquire the property in a voluntary, arms-length transaction. Normally, the lender will have acquired the land only after other attempts to collect the debt failed or appeared to be fruitless because of the debtor's poor financial position. Moreover, the lender may have acquired the land before CERCLA's effective date, so that the liability was unanticipated.

While creating an uproar in the lending industry, CERCLA imposes no greater liability than does established common law. A lender is not liable under CERCLA because of its security interest in the polluted land; it is liable because of its ownership and control of the land. In fact, far from imposing greater liability than the common law, CERCLA imposes a lower standard because it provides a third-party defense. A truly innocent lender/owner, one that acquired the land without notice of the hazardous materials, exercised due care after discovering them, and disclosed their existence when selling the land, is not liable under CERCLA. In contrast, the common law generally imposes liability on an owner for hazardous artificial conditions

on its land regardless of whether it created them or exercised due care.

SARA has made it significantly more difficult for lenders to qualify for the safe harbor of the third-party defense. Institutional lenders often will have difficulty satisfying SARA's sliding standard for pre-acquisition inquiry, which is weighted to reflect an owner's knowledge and expertise. Therefore, to avoid CERCLA liability as an owner, a lender must conduct a thorough title and environmental inspection of a parcel of land before acquiring it.²⁷⁵ Unless it does so, it may find itself stuck in a quagmire from which it will be costly to escape. It is unlikely that CERCLA liability can be avoided by acquiring the property in the name of a nominee because courts have not permitted defendants to hide behind corporate veils.²⁷⁶

SARA established that lender/owners are potentially liable for CERCLA response costs. The exact scope of that liability, however, has not been defined. This Article suggests that joint and several liability is the most appropriate and effective liability scheme to apply in response cost recovery actions. That scheme must be tempered, however, by flexibility in the reallocation of liability in the related contribution action. In recognition of the differing degrees of moral culpability and active contribution to the waste site, courts should apportion liability based on relative degrees of fault, rather than on a rigid pro rata basis. Additionally, courts should allocate the full amount of damages among the parties to the contribution action, rather than require the plaintiff to bear the portion of damages attributable to insolvent or otherwise unavailable responsible parties. The courts possess the requisite power to adopt these rules as they create the federal common law of CERCLA, and in so doing they will further CERCLA's goals.

²⁷⁵ For a discussion of the precautions a lender should take before acquiring land through foreclosure or a negotiated settlement, see, e.g., Levitas & Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 MERCER L. REV. 581 (1987); Richman & Stukane, *supra* note 13, at 13; Shea, *Protecting Lenders Against Environmental Risks*, May 1987 PRAC. REAL EST. LAW. 11.

²⁷⁶ See *supra* note 190.